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IN THE

SUPREME COURT OF THE UNITED STATES

DECEMBER TERM, 1986

NO.

IRWIN A. SCHIFF,

Petitioner.

- VS -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Second Circuit Court of Appeals violated prior rulings of this Court and set itself in conflict with other Federal Circuits by applying an "objective reasonableness" test to the good faith defense in an attempted tax evasion prosecution.

2. Whether the Second Circuit Court of Appeals violated the holding of this Court in Spies v. United States, 317 U.S. 492 (1943), by permitting the jury to convict Petitioner of attempted income tax evasion without first finding some willful commission in addition to the willful omission of failing to file a return or pay a tax.

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The Petitioner, IRWIN A. SCHIFF, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on September 15, 1986.

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 801 F.2d 108 (2d Cir. 1986), and appears in the Appendix hereto.

JURISDICTION

The opinion of the United States Court of Appeals for the Second Circuit was entered on September 15, 1986. A timely petition for rehearing was denied on October 22, 1986. This petition for certiorari has been filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Second Circuit Court of Appeals violated prior rulings of this Court and set itself in conflict with other Federal Circuits by applying an "objective reasonableness" test to the good faith defense in an attempted tax evasion prosecution.

2. Whether the Second Circuit Court of Appeals violated the holding of this Court in Spies v. United States, 317 U.S. 492 (1943), by permitting the jury to convict Petitioner of attempted income tax evasion without first finding some willful commission in addition to the willful omission of failing to file a return or pay a tax.

STATUTES INVOLVED

26 U.S.C. §7201 provides in pertinent part: "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this Title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony...."

26 U.S.C. §7203 provides in pertinent part: "Any person required under this Title to pay any...tax, or required by this Title or by regulations made under authority thereof to make a return..., who willfully fails to pay such...tax, make such return, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor...."

STATEMENT OF THE CASE

Irwin A. Schiff, the Petitioner here, was convicted at a jury trial of three counts of attempted income tax evasion in violation of 26 U.S.C. §7201 for having "willfully and knowingly attempt[ed] to evade and defeat the...income tax due and owing by him to the United States...by failing to make such income tax return to the said Internal Revenue Service, and by failing to pay to the Internal Revenue Service said income tax, and by concealing and attempting to conceal from all proper officers of the United States of America his true and correct taxable income" for the calendar years 1980, 1981 and 1982. He also was convicted of one count of failure to file a corporate return for Irwin A. Schiff, Inc., for the fiscal year ended August 31, 1981, in violation of 26 U.S.C. §7203. (App. pp. 2b-3b, 1c-6c)

It was not disputed at the trial that Mr. Schiff had filed no personal income tax returns for the years in question, that he was the President of Irwin A. Schiff, Inc.,

and that the corporation also had not filed a return for the year involved. Mr. Schiff, however, was and to some extent remains a leading author and lecturer who advocates the view that citizens are not legally obliged to file tax returns or pay the federal income tax. The trial centered upon Mr. Schiff's state of mind and the nature of his intentions.

The evidence at trial demonstrated clearly the utter absence of any effort to conceal income or the failure to file and pay taxes. Indeed, Mr. Schiff was shown consistently to have broadcast his views to the world, including advertisements in leading newspapers announcing his intention not to file or pay taxes. At the same time, evidence showed that he habitually deposited cash receipts in his personal bank account, thus creating records of cash receipts where none otherwise would have existed.

The Government's evidence, consisting of tape recordings, videotapes, books and articles, newspaper advertisements and

testimony from witnesses, all demonstrated that Mr. Schiff consistently had announced to the world in general and to the IRS in particular his belief, based upon an asserted reading of the United States Constitution and the Internal Revenue Code, that "the income tax is voluntary" and that "there is no provision in the law requiring anyone to file a tax return." Several prosecution witnesses admitted under cross-examination that Mr. Schiff sincerely and passionately believed that he had no legal obligation to file returns or pay taxes and that he is a man of great honesty and integrity who in refusing to file returns or pay taxes was acting upon genuine convictions concerning the meaning of the law. Mr. Schiff also presented testimony from attorneys and other witnesses that they had advised Mr. Schiff that he had no legal obligation either to file or to pay.

The jury deliberated over a period of three days. Every substantive question during deliberation sought clarification of the law relating to the necessary mental

state for guilt. On the third day, the jury reported itself deadlocked on the first three counts. The Court instructed the jury in accordance with Allen v. United States, 164 U.S. 492 (1896), but the jury remained undecided.

The Court at that point instructed the jury that the "willful attempt in some manner to evade or defeat the tax" necessary for conviction on the first three counts could be found upon the basis of facts alleged in the Indictment or in "some other manner...that in some way that the defendant took some action, the purpose of which...was to evade or defeat or attempt to evade or defeat...the tax." (App. pp. 130e-135e) The defendant excepted to the charge on the ground that it permitted him to be convicted for actions not pleaded and without unanimity, and when Mr. Schiff was convicted 30 minutes later, he pursued these issues on appeal.

On appeal, the Second Circuit rejected Mr. Schiff's argument that the Court's reinstruction permitted a non-unanimous

jury verdict based upon facts not pleaded. In doing so, the Court held that there was no error in this respect. Rather, the Court held that Mr. Schiff had misunderstood the jury charge. The jury in fact was instructed, in the view of the Second Circuit, in a manner which was essentially circular. The trial Court had charged the jury that in order to convict it must find that Mr. Schiff "willfully attempted, in some manner, to evade or defeat such tax, with the specific intent to defraud the Government of such tax." The Court of Appeals held that the phrase "in some manner" simply referred back "to one or more of the three alleged methods of evasion." (App. p.21b) The "three methods" were those alleged in the Indictment -- (1) failure to file, (2) failure to pay, and (3) "concealing and attempting to conceal...his true and correct taxable income." Thus, the jury was permitted to convict Mr. Schiff solely upon a finding of failure to pay or failure to file.

The defense at trial was that Mr.

Schiff had no fraudulent intent but, rather, failed to file and failed to pay upon the basis of a sincere if misguided belief that he was not obliged to do so. The Court instructed the jury repeatedly on this issue as follows: "In considering the defendant's claim that in good faith he did not believe the law required him to file returns or to pay taxes on income, the question is, whether or not he truly held such a belief; and whether there was a basis on which he could have held such a belief. Your determination of these questions must be made after examining all of the evidence." (App. p. 30e) The Petitioner excepted to this as a "should have known" charge which violated this Court's holdings in United States v. Bishop, 412 U.S. 346, 360 (1973), and United States v. Pomponio, 429 U.S. 10, 12 (1976). (App. pp. 54e-56e)

On appeal, the Second Circuit questioned whether the charge as given really did impose an objective reasonableness test upon Petitioner's assertion of good faith,

but went on to hold that if such a test were imposed, such an instruction was not erroneous. Thus, the Court of Appeals in this case has authorized the District Courts in the Circuit to impose an objective reasonableness test upon the good faith defense in income tax evasion prosecutions. The Court expressly declined to follow the First Circuit's contrary holding in United States v. Aitken, 755 F.2d 188, 193 (1st Cir. 1985), although questioning whether that decision really prohibited an instruction like the one given here. (App. pp. 8b-17b)

REASONS FOR GRANTING THE WRIT

I. The Second Circuit Court of Appeals violated prior rulings of this Court and set itself in conflict with other Federal Circuits by applying an "objective reasonableness" test to the good faith defense in an attempted tax evasion prosecution.

In United States v. Aitken, 755 F.2d 188 (1st Cir. 1985), the First Circuit held specifically that a good faith misunderstanding of the law, however farfetched, is

a valid defense to prosecution for either attempted income tax evasion or failure to file returns. Under that holding, the standard by which a jury must judge the good faith defense is a purely subjective one: did the defendant actually believe it? Qualifying the defense with any sort of test of objective reasonableness is plain error. See also, United States v. Dack, 747 F.2d 1172, 1175 (7th Cir. 1984); United States v. Phillips, 775 F.2d 262 (10th Cir. 1985).

The instruction approved by the Second Circuit in this case clearly is prohibited by the holding of the First Circuit as well as by the holdings of other Circuits noted. In this case, the trial Court twice instructed the jury to evaluate Petitioner's mistake of law defense by considering "whether there was a basis on which he could have held such a belief," and followed that instruction with another in which "deliberate indifference or refusal to be informed" was held out as a measure of good faith. See also, United

States v. Burton, 737 F.2d 439, 441-42 (5th Cir. 1984); Mann v. United States, 319 F.2d 404, 409 (5th Cir. 1963), cert. denied 375 U.S. 986 (1964).

The Second Circuit in its decision argued that the trial Court's instruction in this case could be interpreted as simply an instruction that the jury should consider the presence or absence of a basis for the asserted belief as circumstantial evidence of whether the Petitioner really held the belief. That argument, however, is contradicted by the very language of the jury instruction objected to: "The question is, whether or not he truly held such a belief; and whether there was a basis on which he could have held such a belief. Your determination of these questions must be made after examining all of the evidence." (Emphasis supplied.) Thus, unquestionably, the trial Court imposed and the Court of Appeals approved two separate tests which a good faith defense must pass before it can be accepted by a jury -- (1) whether the defendant

"truly held such a belief," and (2) "whether there was a basis on which he could have held such a belief."

So far as can be determined, the Second Circuit is the only Circuit which has approved an objective reasonableness test for the good faith defense in an attempted tax evasion prosecution. This ruling is directly contrary to the holding of the First Circuit and appears to be contrary to the holdings of several other Circuits as well. Certiorari should be granted to resolve the clear conflict among the Circuits on this important issue of law.

II. The Second Circuit Court of Appeals violated the holding of this Court in Spies v. United States, 317 U.S. 492 (1943), by permitting the jury to convict the defendant of attempted income tax evasion without first finding some willful commission in addition to the willful omissions of failing to file a return and pay a tax.

As noted previously, the jury in this case deadlocked after three days of deliberation. By its questions, the jury

made it clear to the trial judge that the basis of deadlock was its inability to determine whether Petitioner had "concealed and attempted conceal" his income from the Government. The jury inquired whether the concealment and attempted concealment of income was an essential element of the offense charged in the first three counts of the Indictment. The Court responded that this element need not be found to have existed in order to convict, provided that the jury did find proven some other act or omission constituting a willful attempt to evade the tax.

On appeal, Petitioner contended that this re-instruction permitted the jury to convict him upon the basis of allegations not contained in the Indictment and created a very substantial likelihood of a jury verdict which was not unanimous as to the underlying factual determinations. Petitioner specifically pointed out to the Court of Appeals that no other interpretation of the re-instruction would be reasonable, since of course the element of

of concealment and attempted concealment was essential to conviction because a mere failure to file a return and failure to pay a tax alone is not sufficient to constitute the crime of attempted tax evasion. Spies v. United States, 317 U.S. 492 (1943); United States v. Copeland, 786 F.2d 768 (7th Cir. 1986).

The Court of Appeals, however, did not interpret the jury instruction in the same way Petitioner did. The Court of Appeals held that the real meaning of the re-instruction was that the jury could convict Petitioner of attempted tax evasion upon the basis of any "one or more of the three alleged methods of evasion." (App. p. 21b) The Court of Appeals thus held here that evidence of a mere failure to file and failure to pay could constitute a sufficient basis to convict of attempted tax evasion. Since there was no dispute at trial that Mr. Schiff had indeed intentionally failed to file and failed to pay, it is not surprising that the jury returned a verdict of guilty on all counts almost

immediately after the re-instruction was given.

The re-instruction was a direct violation of the holding of this Court in Spies v. United States, supra. It also is clearly contrary to holdings this year in the Seventh Circuit and the Fifth Circuit. United States v. Copeland, supra; United States v. Nelson, 791 F.2d 336, 337-38 (5th Cir. 1986). Cf., Sansone v. United States, 380 U.S. 343, 351 (1965).

Because the Court of Appeals in this case interpreted the income tax evasion statute in a manner directly contrary to prior holdings of this Court as well as of the other Circuits, certiorari must be granted to correct the error.

CONCLUSION

For these reasons, to prevent a substantial deviation from the prior holdings of this Court in an important area of federal law and to resolve conflicts among the Circuits which are of the greatest importance in criminal tax evasion prosecutions, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted:

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Attorney for Petitioner

December 18, 1986

86-1026

IN THE

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DECEMBER TERM, 1986

NO.

IRWIN A. SCHIFF,

Petitioner.

- VS -

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI TO

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APPENDIX

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APPENDIX A

RULING ON PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

As a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 22nd day of October one thousand nine hundred and eighty-six

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UNITED STATES OF AMERICA

Appellee,

V Docket No. 86-1030

IRWIN A. SCHIFF,

Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant IRWIN A. SCHIFF

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith
Clerk

APPENDIX B

DECISION BY COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1425 August Term, 1985

(Argued June 18, 1986

Denied September 15, 1986)

Docket No. 86-1030

UNITED STATES OF AMERICA,

Appellee,

v.

IRWIN A. SCHIFF,

Defendant-Appellant.

B e f o r e: MESKILL and KEARSE,

Circuit Judges, and METZNER,*

District Judge.

Appeal from judgment of the United States District Court for the District of Connecticut, Dorsey, J., convicting appel-

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* Honorable Charles M. Metzner, United States District Judge for the Southern District of New York, sitting by designation.

lant after a jury trial of attempted tax evasion, 26 U.S.C. §7201 (1982), and willful failure to file a corporate tax return, 26 U.S.C. §7203 (1982). Appellant claimed several errors in jury charge.

Affirmed.

JOHN R. WILLIAMS, New Haven, Connecticut (Williams and Wise, New Haven, Connecticut, of counsel), for Appellant.

MICHAEL HARTMERE, Assistant United States Attorney, District of Connecticut, New Haven, Connecticut (Stanley A. Twardy, Jr., United States Attorney for the District of Connecticut, New Haven, Connecticut, of counsel), for Appellee.

MESKILL, Circuit Judge:

Irwin A. Schiff appeals from a judgment of the United States District Court for the District of Connecticut, Dorsey, J., convicting him after a jury trial of three counts of attempted tax evasion in violation of 26 U.S.C. §7201 (1982) and one count of willful failure to file a corporate tax return in violation of 26 U.S.C. §7203 (1982). Schiff claims several

errors in the district court's charge to the jury. We conclude that these claims are without merit and affirm the judgment of the district court.

BACKGROUND

Although the trial below was lengthy, lasting from October 1 through October 25, 1985, most of the facts are uncontested. Therefore, we limit our discussion of them.

Appellant Schiff is an author and lecturer who describes himself as a "professional tax resister." J. App. at 122. The jacket of one of his books, entitled How Anyone Can Stop Paying Income Taxes, describes him as "an economist and constitutionalist [and] America's leading untax expert." Supp. to J. App. Schiff's brief on appeal modestly states that "[w]ith the possible exception of H. & R. Block, Irwin Schiff may well be the most well known and highly publicized speaker and writer on the income tax in America," having appeared on major radio and television programs, having been the subject of "hundreds" of newspaper and

magazine articles and having authored numerous books and articles on the income tax. Br. of Defendant-Appellant at 2. Schiff does not dispute that he earned income during calendar years 1980, 1981 and 1982, that he failed to file federal income tax returns and did not pay income taxes for those years. He also does not dispute that Irwin A. Schiff, Inc., of which he was president, failed to file a tax return for its fiscal year ending in 1981.

Schiff was charged by an indictment filed April 3, 1985, with three counts of attempted tax evasion relating to income earned and taxes owed for calendar years 1980-82 and one count of willful failure to file a tax return for Irwin A. Schiff, Inc., for its fiscal year ending in 1981. 26 U.S.C. §§7201, 7203 (1982). The first three counts of the indictment charged that Schiff had "knowingly attempt[ed] to evade and defeat" the income tax owed by him for each of the three years in question by failing to make tax returns, failing to pay the income tax he owed and concealing and

attempting to conceal his income. J. App. at 4-6.

Because of the lack of dispute over Schiff's failure to file tax returns or pay taxes, both the government and Schiff concentrated at trial on Schiff's criminal intent or lack of it and the question of whether he had concealed or attempted to conceal income. Schiff did not testify. The government sought to prove Schiff's evasive intent and knowledge of the tax law through his own writings, tapes of his speeches, evidence of his dealings with banks in Switzerland and the Cayman Islands and evidence that Schiff used and recommended the use of special pens with non-reproducible ink in order to thwart Internal Revenue Service attempts to photocopy financial records. The government also tried to prove Schiff's knowledge of the law by evidence of his prior experiences with the federal courts. A portion of Judge T. Emmet Clarie's jury instructions during Schiff's 1980 trial for failure to file tax returns was read to the

jury, as was a portion of Judge Ellen Bree Burns' 1981 opinion in a civil case involving Schiff rejecting some of Schiff's constitutional arguments against the income tax. Schiff's defense consisted primarily of evidence of advice given to him on tax matters by various attorneys and an accountant.

After fourteen days of testimony, the case went to the jury on the afternoon of October 12, 1985. They jury asked several questions. In response to one of them during the first afternoon of deliberations, the court sent a written copy of its complete jury charge into the jury room as a court exhibit with the consent of counsel. On October 25, the jury reached a verdict of guilty on all four counts of the indictment. Schiff appeals.

DISCUSSION

Schiff's claims on appeal are limited to asserted errors in the trial court's jury instructions. He argues that the court's instructions erroneously imposed an objective test rather than a subjective

test on his good faith defense, effectively amended the indictment to permit a conviction based on uncharged conduct and permitted Schiff to be convicted by a non-unanimous jury. We discuss each claim in turn.

1. Good Faith Defense

In order to convict Schiff of attempted tax evasion in violation of 26 U.S.C. §7201, the government had to prove that Schiff had willfully taken steps to evade or defeat his income tax obligation. "[W]illfulness in this context simply means a voluntary, intentional violation of a known legal duty." United States v. Pomponio, 429 U.S. 10, 12 (1976) (per curiam); United States v. Bishop, 412 U.S. 346, 360 (1973). In Bishop, the Supreme Court explained the rationale for requiring willfulness as a predicate to criminal liability for tax evasion.

> In our complex tax system, uncertainty often arises even among taxpayers who earnestly wish to follow the law. The Court has said, "It is not the purpose of the law to penalize frank difference of opinion or innocent errors made

> despite the exercise of reasonable care." Spies [v. United States], 317 U.S. [492,] 496 [1943]. Degrees of negligence give rise in the tax system to civil penalties. The requirement of an offense committed "willfully" is not met, therefore, if a taxpayer has relied in good faith on a prior decision of this Court. . . . The Court's consistent interpretation of the word "willfully" to require an element of mens rea implements the pervasive intent of Congress to construct penalties that separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers.

412 U.S. at 360-61 (citations omitted). Schiff's defense at trial was that he believed in good faith that the income tax was voluntary and that he was, therefore, not required to pay the tax.

In charging the jury on the good faith defense to the element of willfulness, the district court said in part:

> In considering the Defendant's claim that in good faith he did not believe the law required him to file returns or to pay taxes on income, the question is, whether or not he truly held such a belief; and whether there was a basis on which he could have held such a belief. Your determina-

> tion of these questions must be made after examining all of the evidence.

J. App. at 265 (emphasis added).[1/] Schiff failed to object to the italicized portion of the charge when it was initially given to the jury or when it was included in the written charge that was sent into the jury room. He now argues that the italicized language was plain error because it imposed an objective rather than a subjective test of good faith. For the following reasons, we conclude that the district court's language, taken in context, did not impose an objective test and, even if it did, it was not erroneous.

The willfulness of one accused of tax crimes may be proved by circumstantial evidence. United States v. Schiff, 612 F.2d 73, 77-78 (2d Cir. 1979); see United States v. MacKenzie, 777 F.2d 811, 818 (2d Cir. 1985) (defendants' conduct and educational background were evidence of their awareness that they were violating tax law). As a practical matter, such evidence is likely to be the only type available to support or rebut a good faith defense other

than the word of the defendant himself. If the defendant's mere claim of good faith is not to be the end of the case, a trier of fact must evaluate the "basis" for that claim in order to determine whether the claim is genuine. The district court here was properly reminding the jury of that obligation. This portion of the charge did not, as Schiff argues, require the jury to determine objectively whether a reasonable person could have believed that the income tax was voluntary. By its terms, the charge restricted the inquiry to whether Schiff himself actually held such a belief, i. e., whether his claim of such belief was credible.

Schiff's tardy complaints about the instruction to evaluate the basis for his good faith claim are weakened by timely objections he made to other portions of the charge. Schiff excepted to the court's charge on the Privacy Act, arguing that the Act "could provide a sufficient basis for the jury to conclude that the Defendant acted in good faith." J. App. at 285

(emphasis added). He also asserted that conclusive weight should be given to a finding of reliance on the advice of an accountant or attorney, in effect arguing that such reliance should be a sufficient basis for his good faith defense as a matter of law. Thus, Schiff recognizes, as we do, that claims of good faith cannot be evaluated in a vacuum.

Moreover, Schiff's brief on appeal points with approval to a charge quoted in a footnote to our 1979 opinion in a case involving him. The quoted charge, like the one Schiff now attacks, directed the jury to determine whether Schiff "acted in accordance with a good faith understanding of the law, based upon, among other things, a good faith reliance on judicial decisions of the federal courts or a good faith belief that the documents filed [by Schiff] constituted in each case an income tax return." United States v. Schiff, 612 F.2d at 78 n. 6 (emphasis added). There, as here, the district court recognized that an evaluation of a good faith defense requires

an inquiry into its basis.

While we conclude that the "basis" instruction did not impose an objective reasonableness test on Schiff's assertion of good faith, we also conclude that even if such a test had been imposed by the instruction, that would not have been error. We recently applied an objective test of reasonableness in United States v. Ebner, 782 F.2d 1120, 1125 (2d Cir. 1986), in rejecting a claim of good faith belief in the tax exempt status of the Life Science Church (LSC). A state court had issues a permanent injunction against the defendants in Ebner, holding, inter alia, that their claims to federal tax exempt status were invalid. Id. at 1124. We held that that state court "opinion clearly demonstrated that the defendants could not reasonably believe that the supposed tax benefits of an LSC 'ministry' existed under the law." Id. at 1125 (emphasis added). See United States v. Claiborne, 765 F.2d 784, 798 (9th Cir. 1985) (government may prove willfulness by circumstantial evi-

dence that defendant "knew or must have known' that tax returns he filed were false.

Here, as in Ebner, there was evidence of a court decision in a prior case involving the defendant, rejecting some of his arguments against the legality of the federal income tax. The decision here had been rendered by a federal court. As we noted in Ebner, such a prior decision is an "authoritative statement" on the law. 782 F.2d at 1125-26. It was thus powerful evidence that Schiff could no longer reasonably believe that his contrary view of the law was correct. Judge Clarie's jury instructions in Schiff's 1980 trial on his failure to file income tax returns were similarly authoritative.

It is well established that the good faith defense encompasses misunderstanding of the law, not disagreement with the law. United States v. Kraeger, 711 F.2d 6, 7 (2d Cir. 1983). The distinction is necessary to the functioning of the tax system. Without it, any taxpayer could evade tax obli-

gations simply by stubbornly refusing to admit error despite the receipt of any number of authoritative statements of the law. At some point, such stubbornness becomes unreasonable; the line is crossed between misunderstanding and disagreement and the taxpayer can no longer successfully assert a defense of good faith.

In accord with our analysis above, we also reject Schiff's challenge to another portion of the charge which, he claims, exacerbated the problem created by the "basis" instruction. While charging on the fourth count of the indictment, willful failure to file a corporate tax return, the court gave the following instruction on "conscious avoidance."

> In determing whether a Defendant act[ed] knowingly and willfully, you may consider, as well, whether the Defendant deliberately closed his eyes to what otherwise would have been obvious to him. A finding beyond a reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge.
>
> Stated another way, a defendant's knowledge of a fact may be inferred

> from willful blindness to the existence of that fact. You may consider whether or not the Defendant displayed a deliberate indifference or refusal to be informed in this regard. It is entirely up to you as to whether you find any deliberate closing of the eyes, and the inference which may be drawn from any such evidence.

J. App. at 269-70. Schiff made a timely objection to this language.

We recently approved of a conscious avoidance charge in a tax context, United States v. MacKenzie, 777 F.2d 818-19 & n.2, and we have noted a wide range of cases where conscious avoidance charges are proper, United States v. Lanza, 790 F.2d 1015, 1021-22 (2d Cir. 1986): The charge here, like the charge at issue in MacKenzie, referred to conscious avoidance of knowledge of "a fact," not of the law, as Schiff contends. The distinction is not as critical in this case, however, as Schiff claims.

The government correctly pointed out at oral argument that Schiff's knowledge of tax law was, itself, a fact to be proved as part of the government's case. Pomponio,

429 U.S. at 12; see Ebner, 782 F.2d at 1125-26 (prior court opinion admitted into evidence to prove the fact that defendants were "on notice that their conduct was illegal"); MacKenzie, 777 F.2d at 818 (conduct and education of defendants supported inference of knowledge of law); Claiborne, 765 F.2d at 798 (defendant federal judge's own understanding of tax law was "highly relevant" to his good faith defense). Our analysis above indicates that there is a point at which a defendant can no longer claim a lack of knowledge in good faith. The conscious avoidance instruction permits a jury, on the basis of all of the evidence, to decide that the point at which the defendant is on notice of the law, whether he subjectively agrees with it or not, has been reached. As we have noted above, continued disagreement with the law after this point is not a defense. See Kraeger, 711 F.2d at 7.

To the extent that United States v. Aitken, 755 F.2d 188, 193 (1st Cir. 1985), might be read to establish a subjective

good faith defense which would prevail despite a finding that the defendant was fully on notice of the law, we decline to follow it. We do not read Aitken as going that far, however. In our view, Aitken only restates the rule that a good faith misunderstanding of tax law is a defense, while disagreement with the law, no matter how passionately advocated, is not. See id. at 191-93 & n.4.

2. Amendment of Indictment

Schiff next attacks an instruction given by the district court in response to a jury question. The first three counts of Schiff's indictment had charged that Schiff:

> did willfully and knowingly attempt to evade and defeat the said income tax due and owing by him to the United States of America for the said calendar year by failing to make such income tax return to the said Internal Revenue Service, and by failing to pay to the Internal Revenue Service said income tax, and by concealing and attempting to conceal from all proper officers of the United States of America his true and correct taxable income.

J. App. at 4-5 (emphasis added). The jury's question was whether it must find "concealing and attempting to conceal" proved beyond a reasonable doubt.

Rather than just answering "no" as urged by the government or "yes" as urged by Schiff, the court responded in some detail. First, after reading the pertinent part of the indictment, the court stated that one element of attempted tax evasion was "that defendant willfully attempted, in some manner, to evade or defeat such tax, with the specific intent to defraud the government of such tax." J. App. at 433 (emphasis added). Then, the court continued:

> In the indictment there are three ways in which the government has made the charge that there was a willful attempt in some manner to evade or defeat the tax. What you must be concerned with is whether the Government has proven to your satisfaction beyond a reasonable doubt each of the three elements as I have charged them to you. Therefore, the answer to your question is not really either yes or no in the sense that if the evasion and the only act of evading that you find proven was by the concealing or

> attempting to conceal, then the answer to the question is, yes. But if you find that some other manner which is the third element of the proof necessary is something, and this again is for you to decide if it happens to be the case, is an act or omission other than concealment, but which nonetheless constitutes a willful attempt on the part of the defendant to evade or defeat the tax, then the answer to the question is, no.

J. App. at 433-34. The court cautioned the jury again that the government had "specified three ways" in which Schiff had allegedly attempted to evade the income tax. J. App. at 434-35. Finally, it repeated a portion of its earlier charge on the elements of attempted tax evasion.

Schiff argues here, as he did below, that this language, in effect, amended the indictment against him so as to permit him "'to be convicted in some manner other than that which he was charged.'" Br. of Defendant-Appellant at 14 (quoting J. App. at 437). He concedes that the court's treatment of the italicized "and's" as "or's" -- in permitting a conviction based on proof of any one of the three methods of

attempted tax evasion -- was "probably" not reversible error. Br. of Defendant-Appellant at 14. He argues, however, that the court's repeated use of "in some manner" or equivalent language in combination with the change from "and" to "or" constituted fatal error because it permitted the jury to base a conviction for attempted tax evasion on conduct other than that charged in the indictment. This argument is without merit.

"[I]t appears settled that indictments worded in the conjunctive, charging violations of statutes worded in the disjunctive, can be supported by proof of either of the conjoined means of violating the act." United States v. Cioffi, 487 F.2d 492, 499 (2d Cir. 1973). Thus, the court's effective changing of "and" to "or" here was not error.

The use of the "in some manner" language to explain an element of the crime of attempted tax evasion was not improper in the context of the total charge. The court had used similar language many times

in its earlier oral and written changes without objection. In both the oral and the written charges, the court cautioned that the jury must "determine the guilt or innocent of the defendant from the evidence in this case solely in relation to the conduct or offenses charged in the indictment." J. App. at 363, 278. Then, in the challenged instruction, it noted twice that only three methods of attempted tax evasion were specified in the indictment. Taken in context then, the "in some manner" language referred to one or more of the three alleged methods of evasion. These instructions were adequate to insure that the jury would properly restrict its deliberations to those three alleged methods of evasion.

This case is thus unlike Stirone v. United States, 361 U.S. 212 (1960), upon which Schiff relies. In Stirone, the trial court permitted the admission of evidence of an uncharged act and then permitted the jury to rely on that evidence in determining guilt. Id. at 214. Here, Schiff does not argue that evidence of uncharged acts

was admitted and the trial court on several occasions reminded the jury of its duty to determine Schiff's guilt or innocence only on the basis of acts specified in the indictment.

3. Unanimous Jury

It is true, as Schiff argues, that a jury must reach a unanimous verdict as to the factual basis for a conviction, United States v. Peterson, 768 F.2d 64, 66-67 (@d Cir. 1985); United States v. Gipson, 553 F.2d 453, 456-59 (5th Cir. 1977); United States v. Natelli, 527 F.2d 311, 324-25 (2d Cir. 1975), cert. denied, 425 U.S. 934 (1976), at least insofar as that basis can be broken down into "distinct conceptual groupings" of facts, Peterson, 768 F.2d at 67; Gipson, 553 F.2d at 458. A general instruction on unanimity is sufficient to insure that such a unanimous verdict is reached, Peterson, 768 f.2d at 67-68; United States v. Murray, 618 F.2d 892, 898-99 (2d Cir. 1980); Natelli, 527 F.2d at 325, except in cases where the complexity of the evidence or other factors create a

genuine danger of jury confusion, United State v. Payseno, 782 F.2d 832, 835-37 (9th Cir. 1986). A conviction based on such a verdict will stand if there was sufficient evidence with respect to each "specification" in the challenged count of the indictment. Peterson, 768 F.2d at 67; Natelli, 527 F.2d at 325.

Here, the trial court, in effect, gave a general unanimity charge three times: first in its oral charge, a second time in the written version of the charge that was sent into the jury room and a third time in its "modified Allen charge." J. App. at 418, 425. The court denied Schiff's request for a specific charge on the requirement of unanimity as to the factual basis for the verdict. On this record, "[w]e do not say it would be wrong for a trial judge to give the charge requested, but it [was] not error to refuse it." Natelli, 527 F.2d at 325 (footnote omitted).

The first three counts of the indictment charged Schiff with attempting to

"evade and defeat" the income tax he owed by failing to make income tax returns, failing to pay income tax and concealing and attempting to conceal his income. Even if each of these three specifications is conceptually distinct from the other two so that unanimity concerns arise, the district court was neither faced with the complexity that created the need for a special instruction in Payseno nor the insufficiency of evidence that caused the reversal in Natelli. The specifications of Payseno involved separate acts of extortion carried out by various individuals, acts directed at different victims at different times and in widely separated locations. Here, the alleged acts were closely interrelated and carried out by a single individual. Schiff concedes that intent and state of mind were the primary disputed issues. He concedes that he neither filed tax returns nor paid taxes and there was ample evidence to support a finding that he concealed or attempted to conceal his income. On these facts, the oft-repeated general unanimity

charge was sufficient to insure a valid, unanimous verdict.

We have rejected the notion that the district court's instructions in response to the jury question about the need for proof of "concealing or attempting to conceal" had the effect of opening the door to findings of guilt based on uncharged acts. Accordingly, we also reject Schiff's argument that jurors after receiving those instructions could have reached a non-unanimous verdict on the basis of such uncharged acts.

CONCLUSION

We have carefully considered all of Schiff's arguments on appeal and find them to be without merit. We affirm the judgment of the district court.

FOOTNOTE

1/ The charge on the element of willfulness was quite lengthy. The portion devoted to the good faith defense was as follows:

> If a person, in good faith, believes that he has paid all the taxes he owes, he cannot be guilty of criminal intent to evade the tax. He cannot be liable if in good faith he holds a misunderstanding of the requirements of the law or a good faith belief that his income was not taxable. The grounds on which Defendant bases his claims of good faith in a belief that his conduct was lawful may be considered in deciding whether he in fact acted in good faith, or whether he intended and willfully attempted to evade or defeat the tax. A defendant's disagreement with the law, no matter [how] earnestly held, does not constitute a defense of good faith misunderstanding or mistake. It is the duty of all citizens to obey the law whether they agree with it or not.
>
> The issue of intent, as to whether the Defendant willfully attempted to evade or defeat the tax, is one that you must determine from a consideration of all the evidence in the case bearing on the Defendant's state of mind.

In deciding whether the Defendant has been proven to have attempted to evade or defeat the payment of a tax for which he was liable, that is to say whether he acted willfully, voluntarily and intentionally, you may consider all of his knowledge, the law of which he had knowledge, including any and all court decisions which came to his attention, the Internal Revenue Code, the constitution, and any legal advice which was given to him.

In considering the Defendant's claim that in good faith he did not believe the law required him to file returns or to pay taxes on income, the question is, whether or not he truly held such a belief; and whether there was a basis on which he could have held such a belief. Your determination of these questions must be made after examining all of the evidence.

J. App. at 264-65.

APPENDIX C

INDICTMENT

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	CRIMINAL NO.
v.	:	N-85-20 (RCZ)
	:	26 U.S.C. §§7201
	:	7203 (Income Tax
	:	Evasion; Failure
	:	to File Corpo-
IRWIN A. SCHIFF	:	rate Retuns)

I N D I C T M E N T

The Grand Jury charges:

COUNT ONE

That during the calendar year 1980, IRWIN A. SCHIFF, the defendant herein, a resident of Hamden, Connecticut, had and received taxable income of approximately $26,529.13; that upon said taxable income he owed to the United States of America income tax of approximately $6,485.96; that he was required by law on or before April 15, 1981, to make an income tax return to the Internal Revenue Service, and to pay such income tax; that well knowing the foregoing facts, the said IRWIN A. SCHIFF on or about April 15, 1981, in the District

of Connecticut, did willfully and knowingly attempt to evade and defeat the said income tax due and owing by him to the United States of America for the said calendar year by failing to make such income tax return to the said Internal Revenue Service, and by failing to pay to the Internal Revenue Service said income tax, and by concealing and attempting to conceal from all proper officers of the United States of America his true and correct taxable income.

In violation of Section 7201, Internal Revenue Code; Title 26, United States Code, Section 7201.

COUNT TWO

That during the calendar year 1981, IRWIN A. SCHIFF, the defendant herein, a resident of Hamden, Connecticut, had and received taxable income of approximately $19,635.00; that upon said taxable income he owed to the United States of America income tax of approximately $3,246.09; that he was required by law on or before April 15, 1982, to make an income tax return to

the Internal Revenue Service, and to pay such income tax; that well knowing the foregoing facts, the said IRWIN A. SCHIFF on or about April 15, 1982, in the District of Connecticut, did willfully and knowingly attempt to evade and defeat the said income tax due and owing by him to the United States of America for the said calendar year by failing to make such income tax return to the said Internal Revenue Service, and by failing to pay to the Internal Revenue Service said income tax, and by concealing and attempting to conceal from all proper officers of the United States of America his true and correct taxable income.

In violation of Section 7201, Internal Revenue Code; Title 26, United States Code, Section 7201.

COUNT THREE

That during the calendar year 1982, IRWIN A. SCHIFF, the defendant herein, a resident of Hamden, Connecticut, had and received taxable income of approximately $90,872.45; that upon said taxable income

he owed to the United States of America income tax of approximately $39,407.31; that he was required by law on or before April 15, 1983, to make an income tax return to the Internal Revenue Service, and to pay such income tax; that well knowing the foregoing facts, the said IRWIN A. SCHIFF on or about April 15, 1983, in the District of Connecticut, did willfully and knowingly attempt to evade and defeat the said income tax due and owing by him to the United States of America for the said calendar year by failing to make such income tax return to the said Internal Revenue Service, and by failing to pay to the Internal Revenue Service said income tax, and by concealing and attempting to conceal from all proper officers of the United States of America his true and correct taxable income.

In violation of Section 7201, Internal Revenue Code; Title 26, United States Code, Section 7201.

COUNT FOUR

That during the fiscal year ended

August 31, 1981, IRWIN A. SCHIFF, the defendant herein, was the president and responsible of Irwin A. Schiff, Inc., a corporation not expressly exempt from tax, with its principal place of business at Hamden, in the District of Connecticut, and by reason of such facts IRWIN A. SCHIFF was required by law after the close of the fiscal year ended August 31, 1981, and on or before November 15, 1981, for an on behalf of the said corporation, to make an income tax return to the District Director of Internal Revenue for the Internal Revenue District of Connecticut, at Hartford, in the District of Connecticut, or to the Director, Internal Revenue Service Center, Northeast Region, Andover, Massachusetts, stating specifically the items of the corporation's gross income and the deductions and credits allowed by law; that wll knowing all of the foregoing facts, IRWIN A. SCHIFF did willfully and knowingly fail to make said return to the said District Director of Internal Revenue, to the said Director of the Internal

Revenue Service Center, or to any other proper officer of the United States.

In violation of Section 7203, Internal Revenue Code; Title 26, United States Code, Section 7203.

A TRUE BILL

_____/s/
FOREMAN

_____/s/
ALAN H. NEVAS
UNITED STATES ATTORNEY

_____/s/
MICHAEL HARTMERE
ASSISTANT UNITED STATES ATTORNEY

APPENDIX D

REQUESTS TO CHARGE

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA : CRIMINAL NO.

VS. : N-85-20 (PCD)

IRWIN A. SCHIFF : Oct. 18, 1985

DEFENDANT'S REQUESTS TO CHARGE

The defendant respectfully requests the Court to charge the jury as follows:

1. Mr. Schiff, is presumed to be innocent. That presumption of innocence means that Mr. Schiff, although accused, began this trial with a "clean slate" -- with no evidence against him. And the law permits nothing but legal evidence presented before the jury to be considered in support of the charges Mr. Schiff. So the presumption of innocence alone is sufficient to acquit Mr. Schiff unless after hearing all the evidence in this case you are convinced beyond a reasonable doubt of his guilt after careful and impartial consideration of all the evidence in the case. That means that at the moment when

Mr. Schiff was presented for trial here before you, nothing that you knew about him or might imagine or guess about him, should be considered by you at all; that his slate was wiped clean at that moment; that he stood before you free of any bias, prejudice or burden arising from his position as the defendant; and thatso far as you are concerned he is innocent, and he continues to be innocent unless and until such time as the evidence convinces you beyond a reasonable doubt that he is guilty. Up until the moment, if ever, when you are so convinced, based upon what has taken place here in court before you, then so far as you are concerned Mr. Schiff is innocent of the crimes with which he is charged; and this presumption requires that if a piece of evidence offered is capable of two reasonable constructions, one of which is consistent with innocence and one of which is consistent with guilt, that evidence must be given a construction consistent with innocence. [DeVitt & Blackmar, Federal Jury Procedures & Instructions, 3d

Ed., §11.14.]

2. The burden is, then, upon the prosecution to prove Mr. Schiff guilty of the crimes with which he's charged. He does not have to prove his innocence. That means that the prosecution must prove each and every element necessary to constitute each of the crimes charged, as I shall explain those elements to you. It iss not enough that the prosecution prove some of those elements, for if proof of even one element is lacking, you must find Mr., Schiff not guilty. The prosecution can sustain the burden of proof resting upon it only if the evidence before you establishes the existence of each and every element constituting the crime beyond a reasonable doubt.

3. Proof beyond a reasonable doubt means proof so great and so convincing that you find yourself in a subjective state of near certitude of the defendant's guilt. Any lesser degree of proof than that is not proof beyond a reasonable doubt. [Jackson v. Virginia, 443 U.S. 307, 315 (1979).]

4. Proof beyond a reasonable doubt, in other words, is proof of such a convincing character that a reasonable person would not hesitate to rely and actupon it in the most important of his or her own affairs. [DeVitt & Blackmar, supra, §11.14.]

5. An employee is usually biased in favor of his employer, and therefore you would be entitled to assume that a Government agent would be biased in favor of the Government in a criminal prosecution such as this and consider that fact in evaluating the testimony of a witness who is a Government employee. Whether you do consider that fact rests, however, entirely within your own sound discretion. [United States v. Beekman, 155 F.2d 580, 584 (2d Cir. 1946); Sims v. Georgia, 389 U.S. 404, 406 (1967).]

6. Mr. Schiff has not testified in this case, although he has introduced a number of audio recordings, video-tapes, and written materials produced by him, all of which contain his words and set forth his ideas. An accused person is under no

obligation to become a witness in his own behalf. Under oru law, an accused person may either testify or not as he sees fit. It is for the prosecution to prove him guilty and no burden rests upon him to prove his innocence. There may be many good and sufficient reasons why counsel has chosen not present the testimony of the defendant, and you must not speculate about them. No inference or taint whatsoever may be derived from the fact that Mr. Schiff did not testify, and you must not hold that fact against him in any way. The law never imposes upon a defendant in a criminal case the burden of calling any witness or producing any evidence. [DeVitt & Blackmar, supra, §17.4; Griffin v. California, 380 U.S. 609, 613.]

7. In the first three counts of the Indictment, Mr. Schiff is charged with committing the felony, on three separate dates, of willfully attempting to evade income tax. In order to convict Mr. Schiff on any one of these three counts, the Government must prove beyond a reasonable

doubt each and every one of the following three essential elements: (1) That in the given year, Mr. Schiff actually owed a substantial amount of income tax to the United States; (2) That he intentionally attempted to evade that tax; (3) That he did so willfully. [Lawn v. United States, 355 U.S. 339, 361 (1958); Sansone v. United States, 380 U.S. 343, 351 (1965); Spies v. United States, 317 U.S. 492 (1943); United States v. Burkhart, 501 F.2d 993, 995 (6th Cir. 1974), cert. denied, 420 U.S. 946 (1975); Canaday v. United States, 354 F.2d 849, 851-52 (8th Cir. 1966); United States v. Norris, 205 F.2d 828, 829 (2d Cir. 1953).]

8. Willfulness, which is an essential element of the crimes charged in the first three counts of the Indictment, is a voluntary and intentional violation of a known legal duty. Thus, the Government has the burden of proving that Mr. Schiff actually knew (a) that he had taxable income for the years in question, (b) that he was legally required to file tax returns

reporting such income, and (c) that he was legally required to pay income tax on that income. [United States v. Bishop, 412 U.S. 346. 360 91973); United States v. Pomponio, 429 U.S. 10, 12 (1976); United States v. Fitzsimmons, 712 F.2d 1196, 1198 (7th Cir. 1983); United States v. Aitken, 755 F.2d 188 (1st Cir. 1985); United States v. Peterson, 338 F.2d 595, 598 (7th Cir. 1964), cert. denied, 380 U.S. 911 (1965); United States v. Conforte, 624 F.2d 869, 875 (9th Cir.), cert. denied, 449 U.S. 1012 (1980).]

9. In order to convict Mr. Schiff on any one of the first three counts of the Indictment, the Government is required to prove beyond a reasonable doubt that Mr. Schiff acted with the specific intent to violate a legal obligation of which he had actual knowledge. Contrary to the old saying, in tax evasion cases, ignorance of the law IS an excuse; in fact, ignorance of the law means that the defendant is not guilty. [United Staates v. Murdock, 290 U.S. 389, 396 (1933); United States v.

Dahlstrom, 713 F.2d 1423, 1429 (9th Cir. 1983); United States v. Brown, 411 F.2d 1134, 1137 (10th Cir. 1969).]

10. Reliance upon the advice of an accountant or the advice of an attorney is a defense to a charge of income tax evasion. Reliance upon such advice demonstrates the absence of the essential element of willfulness and thus requires that the defendant be found not guilty if, in fact, he did rely upon such advice. Where the defendant claims he did rely upon such advice, of course, the Government has the burden of proving beyond a reasonable doubt that he did not do so. [United States v. Stone, 431 F.2d 1286, 1288-89 (5th Cir. 1970), cert. denied, 401 U.S. 912 (1971); United States v. Vannelli, 595 F.2d 402, 404-05 (8th Cir. 1979).] Another essential element of the crime of attempted income tax evasion is that the defendant actually have attempted to evade the tax. This means more than merely failing to file a tax return. Some affirmative act of evasion is required and must be proven

beyond a reasonable doubt. Examples of affirmative acts of evasion are keeping duplicate books, making false or altered entries, making false invoices or documents, concealing sources of income, using fictitious names on bank accounts, etc. [Spies v. United States, 317 U.S. 492, 499 (1943).]

11. In the fourth count of the Indictment, Mr. Schiff is charged with willful failure to file a tax return for a corporation. The crime of willful failure to file a tax return has three essential elements and the Government is required to prove each and every one of these elements beyond a reasonable doubt. The three essential elements of this crime are: (1) That the defendant was required by law to file a tax return on behalf of the corporation on the date described in the fourth count of the Indictment; (2) That the defendant failed to file that return at the time required by law; (3) That the defendant's failure to file that return was willful. [United States v. McCormick, 67

F.2d 867, 868 (2d Cir.), cert. denied, 291 U.S. 662 (1933).]

12. I have previously defined willfulness for you. Briefly, willfulness consists of acting or of failing to act with a bad purpose or an evil motive, that is, a voluntary and intentional violation of a known legal duty. In other words, the Government is required to prove beyond a reasonable doubt not only that Mr. Schiff was legally required to file the tax return in querstion but that Mr. Schiff knew he was legally required to do so and voluntarily and with a bad purpose chose not to do so. [United States v. Bishop, 412 U.S. 346, 361 (1973); United States v. Goldstein, 502 F.2d 526, 529-30 (3d Cir. 1974); United States v. Cirillo, 251 F.2d 638, 639 (3d Cir. 1957), cert. denied, 356 U.S. 949 (1958).]

13. A good faith misunderstanding of the law is inconsistent with the essential element of willfulness: if Mr. Schiff had such a misunderstanding of the law then the Government has failed to prove willfulness

beyond a reasonable doubt. [United States v. Buras, 633 F.2d 1356, 1359 (9th Cir. 1980); United States v. Pry, 625 F.2d 689, 691-92 (5th Cir. 1980), cert. denied, 450 U.S. 925 (1981); Cooley v. United States, 501 F.2d 1249, 1253 (9th Cir. 1974), cert. denied, 419 U.S. 1123 91975); United States v. Platt, 435 F.2d 789, 793 (2d Cir. 1970); United States v. Wolters, 656 F.2d 523, 525 (9th Cir. 1981); United States v. Walker, 479 F.2d 407, 409 (9th Cir. 1973).]

THE DEFENDANT

BY_____
JOHN R. WILLIAMS
His Attorney

APPENDIX E

JURY INSTRUCTIONS

THE COURT: Summon the jury.

(WHEREUPON, the jury then came into the courtroom).

THE COURT: Ladies and gentlemen, now that you've heard all of the evidence in the case as well as the final arguments of counsel for the parties.

It becomes my duty to instruct you on the rules of law that you must follow and apply in arriving at your verdict in this case.

In any jury trial there are, in effect, two judges. It is my duty to preside over the trial and to determine what testimony and evidence is relevant under the law for your consideration. It is also my duty at the end of the trial to instruct you on the law applicable to the case.

You however are the judges of the facts. In determining what actually happened in this case it is your sworn duty to follow the law as I define it for you.

You must follow all of the instruc-

tions. You must not disregard any part of the instructions but neither should you give any special attention to any one of the instructions. You must apply the instruction as a whole. You must accept the law as it is here stated. You must not substitute nor follow your own notion as to what the law is or ought to be. You must apply the law, as I give it to you regardless of what the consequences.

By the same token, it is also your duty to base your verdict solely upon the testimony and the evidence in the case, without prejudice or sympathy.

The indictment or formal charge against a Defendant is not evidence of guilt. It does not create any presumption of guilt. The Defendant is presumed to be innocent. That presumption continues until you have made your decision. A Defendant cannot be considered to be guilty just because he's charged with a crime. A Defendant is presumed to be innocent and you should consider him to be innocent until your deliberations are concluded. That presump-

tion is overcome only when his guilt has been proven beyond a reasonable doubt.

The law does not require a Defendant to prove his innocence or to produce any evidence at all. No inference whatever may be drawn if the Defendant elects not to testify. The government has the burden of proving the defendant guilty beyond a reasonable doubt. If it fails to prove each element of a charge beyond a reasonable doubt, you must acquit the Defendant of that charge. If it proves each element of a charge beyond a reasonable doubt, then you should find the Defendant guilty of that charge.

Proof beyond a reasonable doubt is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs. As to a particular fact, if the evidence convinces you that there is no reasonable doubt, then that fact should be considered proven. If you have a reasonable doubt as to a particular fact, that is a doubt based on reason after

consideration of all the evidence, or lack of evidence, then you should not find that fact to have been proven.

While the government's burden of proof is a strict or heavy burden it is not necessary that the Defendant's guilt be proved beyond all possible doubt. If he is only required that the Government's proof exclude any reasonable doubt concerning the Defendant's guilt. If, after weighing all the evidence and the law has given to you, you have a firm, full and abiding conviction that the Defendant is guilty, that is a subject state of near certitude of Defendant's guilt, then that guilt will have been proven beyond a reasonable doubt. If you do not, then you should acquit. Reasonable doubt as to a fact is what would cause reasonable persons to hesitate to act in reliance on that fact. A vague, speculative, imaginary uncertainty is not a reasonable doubt. Reasonable doubt is what would leave you, after a fair and impartial consideration of all the evidence, such that you are unable to say that you have an

abiding conviction as to the Defendant's guilt.

A presumption is a conclusion which the law requires you to make from particular facts, in the absence of convincing evidence to the contrary. A presumption continues in effect until overcome or outweighed by evidence to the contrary; but, unless so outweighed, you are bound to find in accordance with the presumption.

As previously stated, the Defendant is presumed to be innocent until his guilt has been proven beyond a reasonable doubt.

In the remainder of this charge, I shall use the word prove or proved with reference to the Government's burden with respect to your finding various facts or elements in the case.

When I say the government must prove a fact to you, it must prove that fact beyond a reasonable doubt, even though I may not repeat the exact words every time. So also when I say to you that you must find a fact, I mean that you must find it proven beyond a reasonable doubt, even though I

may simply use the word find.

To determine the facts, you must consider only the evidence admitted in the case. The term evidence includes the testimony of witnesses and the exhibits at admitted in the record.

Any statements, objections or arguments made by the lawyers are not evidence. The function of the lawyers is to point out those things that are the most significant or most helpful to their side of the case and, in so doing, to call your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis however it is your recollection and interpretation of the evidence that controls. What the lawyers say is not binding upon you. Also during the course of a trial I occasionally make comments to the lawyers or ask questions of a witness or admonish a witness concerning the manner in which he or she should respond to the questions of counsel. Do not assume from anything that I have said that I have or intended to suggest that I have any opinion

concerning any of the issues in this case. No particular significance should be attached to any question or comment made by me. Except for my instructions to you on the law, you may disregard anything that I may have said during the trial in arriving at your own findings as to the facts.

It is the duty of the attorneys on each side of a case to object when the other side offers evidence or testimony which the attorney believes is not properly admissible. You should not show prejudice against an attorney or his client because the attorney has made such objections.

Upon allowing testimony or other evidence to be introduced over the objections of an attorney, the Court has not, and did not intent to, indicate any opinion as to the weight or affect of any such evidence. As stated before the jurors are the sole judges of the credibility of all witnesses and the weight and effect of all evidence.

When the Court has sustained an objection to a question, addressed to a

witness, the jury must disregard the question entirely, and may draw no inference from the wording of the question, nor speculate as to what the witness would have said if he had been permitted to answer such a question.

While you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you find are reasonable, logical, and justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from facts which you find to have been established by the testimony and evidence. You may thus consider both direct or circumstantial evidence. Direct evidence is the testimony of one who asserts actual knowledge of a fact, such as a eye witness. Circumstantial evidence is proof of a chain of facts and circumstances from which you may infer facts as are reasonable and logical.

The law makes no distinction between

the weight to be given to either direct or circumstantial evidence. It requires only that you weigh all of the evidence. Only if you're convinced of the Defendant's guilty, based upon all of the evidence, beyond a reasonable doubt, can he be convicted.

While you may draw reasonable inferences, you may not speculate nor surmise as to any fact. Neither may you base an inference on any facts unless those facts have been found by you to have been proven.

Now, I have said that you must consider all of the evidence this does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or believability of each witness and the weight to be given to his or her testimony. In weighing the testimony of a witness, you she consider his or her relationship to the government or to the Defendant; his or her interest, if any, in the outcome of the case; his or her manner of testifying; his or her opportunity to

observe or acquire knowledge concerning the facts which he or she has testified about; his or her candor, fairness and intelligence; and the extent to which he or she has been supported or contradicted boy other credible evidence. You may, in short, accept or reject the testimony of any witness in whole or in part.

The weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or non-existence of a particular fact. It is the quality and nature of the evidence that should determine the weight you give it. You may find that the testimony of a smaller number of witnesses, or even a single witness, as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

The credibility of witnesses and the weight to be given to their testimony are matters which it is peculiarlyly [sic] your function to determine. However, I may make properly certain suggestions to you.

No fact is, of course, to be determine

merely by the thumb of witnesses who have testified for or against it; it is the quality, not the quantity, of testimony that counts.

In weighing the testimony of a witness, you should consider his or her appearance upon the stand; you should try to size the witness up; you should have in mind all those little circumstances which point to his or her truthfulness or untruthful this. You should consider any possible bias or prejudice he may have whether for or against the Plaintiff or for the Defendant; in this instance the Plaintiff being the government. His or her interest or lack of interest, of whatever sort, in the outcome of the trial and whether he has permitted bias or interest to color his or her testimony; his or her ability to observe the facts correctly and to remember and relate them truly and accurately and not exaggerate them.

You should test the evidence the witnesses gives by your own knowledge of human nature and of the motives which

influence and control human action. If any facts are admitted or otherwise proved to you, you may well bring them into relation with the witnesses testimony and see if they fit together with it. In short, you are to bring to bear upon such testimony the same conditions and use the same sound judgment you apply to the questions of truth and veracity which are dially presenting themselves for your decision in the ordinary affairs of life.

The credit that you will give to the testimony offered by the various witnesses is something which you must determine. When a witness testifies inaccurately and you do not think that the inaccuracy was consciously dishonest you should bear in mind and scrutinize the whole testimony of that witness. Thus, if you find that that there has been an inaccuracy in one respect on the part of a witness, remember it in judging the rest of his or her testimony, and give it that weight which your common sense leads you to think it ought to have, and which you would attach to it in

ordinary affairs of life, where anyone came to you in a matter and you found that it in some particular he or she was inaccurate.

Inconsistencies or discrepencies [sic] in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing the same incident or transaction may see or hear it differently; and innocent mis-recollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepency [sic] always consider whether it pertains to a matter of importance or to an unimportant detail and whether the discrepancy results in from innocent error or intentional falsehood.

If you conclude that a witness has not only testified falsely but that he or she has done so intentionally or willfully, that fact may be considered in decidind [sic] what if any portion of his or her testimony you will credit.

After all, whether you should believe all of a witnesses testimony or believe any

portion of it, or believe none of it, is for you to decide.

There was testimony here from an officials and agents of the Internal Revenue Service. The testimony of an official or agent is entitled to no special or exclusive sanctity merely because it comes from an official or an agent. A government official or agent who takes the witness stand subjects his or her testimony to the same examination and the same tests that any other witness does and, in the case of an official or an agent, you should not believe him or her merely because he or she is an official or an agent. You should recall his or her demeanor on the stand, his or her manner of testifying, the substance of his or her testimony and weigh and balance it just as carefully as you would the testimony of any other witness.

Officials who testify are ordinary human beings. They are not entitled to be given more credibility or to be believed any more than any other witness who might be called as a witness merely because they

happen to be an official or an agent.

The law does not compel a Defendant in a criminal case to take the witness stand and testify and no presumption of guilt may be raised and no inference of any kind may be drawn from the failure of any Defendant to take the witness stand to testify.

The law imposes on a Defendant in a criminal case no duty or burden of calling any witnesses or producing any evidence. A Defendant is not obliged to prove his innocence nor to disprove his guilt.

The indictment against the Defendant contains separate counts. Each count is a separate and distinct cause of action or charge. Each count embodies or contains allegations which set forth a separate and distinct claim under the statute. The government has the burden of proof as to each claim. You should consider each claim and the evidence that bears upon each claim separately.

Your finding as to a Defendant's guilt or innocence on one count does not affect his guilt or innocence on another count.

The question of the Defendant's guilt or innocence must be determined separately as to each charge.

Counts one, two and three of the indictment which you will have with you, charge that the Defendant was a person required by law to make individual income tax returns and pay an income tax for the calendar years 1980, 1981, and 1982, which returns were to be filed on or before April 15, 1981, April 15, 1982 and April 15, 1983 respectively.

The indictment charged that the Defendant willfully and knowingly attempted to evade and defeat said tax by failing to make such returns, by failing to pay said tax, and by concealing and attempting to conceal from all proper officers of the United States of America his true and correct taxable income in violation of Title 26 United States Code, Section 7201.

That section of the Internal Revenue Code provides, in part, and I quote, any person who willfully attempts in any manner to evade or defeat any tax imposed by this

title or the payment thereof, shall be guilty of an offense against the laws of the United States.

Three essential elements must be proved to establish the offense charged in Counts I, II and III of the indictment, keeping in mind that each count charges a separate offense;

First: That a substantial federal income tax was due and owing from the accused for the calendar year charged in each count.

Second: Actual knowledge of the Defendant that a substantial federal income tax was due and owing from him to the government, and thus was his legal obligation for the calendar year charged in each count.

Third: That the Defendant willfully attempted, in some manner, to evade or defeat such tax, with the specific intent to defraud the government of such tax.

The evidence offered to prove each element must be considered separately for each count as each count charges a separate

offense.

As stated before the burden is always on the prosecution to prove beyond a reasonable doubt every essential element of the crime charged. The law never imposes upon a Defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Title 26 United States Code Section 61 (A), defines gross income as follows: Gross income means all income from whatever source derived, including but not littleed [sic] to the following items: One, compensation for services including fees commissions and similar items; Two, gross income derived from business; Three, gains derived from dealings in property; Four, interest; Five, rents; Six, royalties; seven, dividends; eight, alamony [sic] and separate maintenance payments; nine, annuities; ten, income from life insurance and endowment contracts; 11, pensions; 12, income from discharge of indebtedness; 13, distributive shares of partnership gross income; 14, income in respect of a

deceadent [sic[; 15, income from an interest in an estate or trust.

Title 26 United States Code Section I, was in effect in the years in question, imposed an income tax on individuals with income equal to or in excess of the following: Single persons 1980, three thousand 300 dollars. 1981, 3,300 dollars. 1982, 3,300 dollars.

To prove the Defendant's income tax let me start that again. To prove Defendant's taxable income the government relies upon the bank deposits method.

The theory of this method is that, if a taxpayer is engaged in an income producing business or calling, and is periodically depositing money in bank accounts in his name or in bank accounts under his dominion and control, and to the extent that these departments do not represent redeposits or transfers and are not attributable to gifts, inheritances, loans or other non-taxable sources, such departments are income. The method also contemplates that, if a taxpayer makes payments of curency

curency [sic] from funds not deposited, such payments in curency [sic] need not be considered because any such expenditures since not deposited, would first have to be added to income because they have not been deposited and thus have not been counted as income. If they are first therefore added and then deducted, the addition would be offset by the deduction with no net change on taxable income.

Under this method, the aggregate of the deposits, reduced by any and all non-taxable funds deposited, constitutes gross receipts from which taxable income is determined.

If you find such deposits were made, after making the prescribed eliminations and deductions, you must inquire whether the government has proven that those deposits represented taxable income on which the Defendant intended and willfully attempted to evade and defeat the tax. In this connection if the government has established that the Defendant was engaged in an income producing business or activity

that he was making regular and periodic deposits of money to bank accounts in his name or under his dominion and control, and that such deposits constituted income, you may, but are not required to, infer that such deposits represented income in the year such deposits were made.

Explanations or leads may be offered to the government by, on behalf of, or in relation to the Defendant as to the source of his funds used for deposits during the prosecution years. If these are reasonably susceptible of being checked, the government must investigate such explanations or leads. On the other hand, if relevant leads or explanations are not forthcoming, the government is not required to negate every conceivable source of nontaxable funds.

It is for you to decide whether the government has correctly taken into account all of the factors in using the bank deposits and expenditures method to prove Defendant had taxable income in the years 1980, 1981 and 1983. You must determine

whether the sums of Defendant's bank deposits, as adjusted for each year, represents a reasonable approximation of Defendant's gross receipts; and whether, after subtracting Defendant's allowable business expenses and personal deductions and exemptions from the gross receipts, as computed by the bank deposits method, results in a fair approximation of the Defendant's true income in an amount which is in excess of the amount set by law and is thus taxable.

And in this respect I should add that taxable income and the liability for tax is not dependent upon the actual formalization of the amount due by an assessment.

A bank deposit investigation must establish a guarantee of essential accuracy in the circumstantial proof at trial as an element of the Government's burden of proving guilt beyond a reasonable doubt. The Government satisfies its burden of proving taxable income if it proves substantial deposits, has given the taxpayer credit for allowable deductions, and

shows that it has taken all reasonable steps to eliminate identifiable non-income items.

The adequacy of the bank deposit method of proof depends on whether the Government's investigation was sufficient to support the inference that the unexplained receipts were in fact attributable to currently taxable income.

Proof of the exact amount of the taxable income is not required, nor is there any duty to negate all possible non-income sources of unreported receipts.

Without infringing on the jury's determination of the facts, suffice it to say that the method of proof used by the government in this case does not diminish its duty to prove, beyound [sic] a reasonable doubt, that the Defendant received taxable income in each year charged, in an amount which, under the law as otherwise discussed with you in this charge, created an obligation in the Defendant to file a return and to pay the tax imposed by the law.

The proof need not show the precise taxable income nor the tax thereon. The evidence must establish, however, beyound [sic] a reasonable doubt, that the Defendant had a substantial amount of taxable income and intended and willfully attempted to evade or defeat some substantial portion of the tax proven, as charged.

To attempt to evade or defeat a tax involves two things: First, an intent to evade or defeat the tax; and second, some act willfully done in furtherance of such intent.

So, the word attempt requires that the accused had knowledge and understanding that, during a calendar year, he had an income which was taxable and which he was required by law to report; but that he nontheless [sic] attempted to evade or defeat the tax thereon by willfully failing to report all the income which he knew he had during such calendar year and which he knew it was his duty under the law to state in his return for such year; or by some other act or course of action, the purpose

of which was to evade or defeat the payment of the tax.

Defendant is note merely charged with failure to file tax returns; he's charged with evasion, and thus he must be proven to have taken some action for the purpose of evading or defeating the payment of a tax. This means more than that he merely failed to file a tax return which the law obliged him to file. While failure to file may be an act of evasion, if evasion was his purpose, that is, the purpose of the person failing to file a return, the government must prove an act or acts the purpose and intent of which was specifically to evade or defeat the payment of a tax which the law requires the Defendant to pay.

Various schemes, subterfuges and devices may constitute an attempt to evade or defeat a tax. The statute makes it a crime willfully to attempt, in any way or manner, to evade or defeat any income tax imposed by law. It is for you to determine whether the Defendant did have the intent to evade or defeat a tax which he owed and

whether he acted willfully so as to accomplish, or attempt to accomplish, the evasion or defeat of such a tax.

The attempt to evade or defeat the tax must be a willfull attempt. That is to say, it must be an attempt made voluntarily and intentionally, and with the specific intent to evade or defeat a tax imposed by the income tax laws, which was the legal duty of the accused to pay to the government and which the Defendant knew it was his legal duty to pay. A mere failure to file is not a basis by itself to sustain a conviction under Title 26 of the United States Code Section 7201. The government must prove that the Defendant failed to file returns for the purpose of evading or defeating a tax in order to prove that such an act was willfull.

In other words, the attempt must have been made with the bad purpose of willfully seeking to defraud the government of some substantial amount of income tax lawfully due from the defendant. It is not necessary that the Defendant be shown to have

been animated by an evil motive or bad faith. It is enough if it is shown that the Defendant acteded [sic] willfully for the purpose of attempting to evade or defeat the payment of a tax.

An act or failure to act is willfully done if done voluntarily and intentionally and with the specific intent to do something one is aware the law forbids or with the specific intent to fail to do something one is aware the law requires to be done; that is to say, with a bad purpose either to disobey or to disregard the law. An act or omission is not done intentionally if done inadvertently.

To establish the crime of income tax evasion as charged in the first three counts of the indictment, the government must prove, beyound [sic] a reasonable doubt, that the Defendant willfully attempted to evade or defeat a tax due the government. This involves a specific intent to evade or defeat payment of the tax and some willfull commission of affirmative action by the Defendant in further-

ance of that intent. Intent is a state of the mind that may be inferred from Defendant's acts or conduct and the circumstances of his acts or conduct.

By way of illustration only, a willful attempt may be inferred from a consistent pattern of non-reporting of large amounts of income, the handling of financial affairs so as to avoid making the usual records of transactions of the kind allegedly transpiring in this case, the concealment of assets or sources of income, or from any other conduct which would be likely to mislead or conceal the fact that the Defendant received substantial amounts of income. In determining whether any acts of the Defendant were willfull, you may consider the Defendant's background, his business experience and experience with the law from which you may infer knowledge. You may also consider what the Defendant did to create records.

If a person, in good faith, believes that he has paid all the taxes he owes, he cannot be guilty of criminal intent to

evade the tax. He cannot be liable if in good faith he holds a misunderstanding of the requirements of the law or a good faith belief that his income was not taxable. The grounds on which Defendant bases his claims of good faith in a belief that his conduct was lawful may be considered in deciding whether he in fact acted in good faith, or whether he intended and willfully attempted to evade or defeat the tax. A defendant's disagreement with the law, no matter earnestly held, does not constitute a defense of good faith misunderstanding or mistake. It is the duty of all citizens to obey the law whether they agree with it or not.

The issue of intent, as to whether the Defendant willfully attempted to evade or defeat the tax, is one that you must determine from a consideration of all the evidence in the case bearing on the Defendant's state of mind.

In deciding whether the Defendant has been proven to have attempted to evade or defeat the payment of a tax for which he

was liable, that is to say whether he acted willfully, voluntarily and intentionally, you may consider all of his knowledge, the law of which he had knowledge, including any and all court decisions which came to his attention, the Internal Revenue Code, the constitution, and any legal advice which was given to him.

In considering the Defendant's claim that in good faith he did not believe the law required him to file returns or to pay taxes on income, the question is, whether or not he truly held such a belief; and whether there was a basis on which he could have held such a belief. Your determination of these questions must be made after examining all of the evidence.

There has been reference to the Privacy Act. That statute does not excuse any person from obligations created by the Internal Revenue Code. If you find, on the facts and the law as you are here being instructed, that the Internal Revenue Code obliged the Defendant to file a return and to pay a tax, any such obligation is not

excused by any provision of the Privacy Act.

The Defendant has produced evidence here concerning his good reputation within his community and among those who know him well for the traits of honesty and integrity. You may consider this evidence in determining whether the Defendant did, as he claims, in good faith, believe that in any respect he was not obliged to file returns and was not obliged to pay tax on any income he received.

Count IV of the indictment charges that the Defendant was a person required by law to make a corporate tax return, stating specifically the items of the corporation's gross income and the deductions and credits allowed by law, for the fiscal year ending August 31, 1981, which return was due to be filed on or before November 15, 1981, and that the Defendant willfully failed to make such return, in violation of Title 26 United States Code, Section 7203. Which provides in part, and I quote: Any person required by the law or regulation to make a

return who willfully fails to make such return at the time required by law or regulation shall be guilty of an offense against the United States.

Four essential elements must be proved in order to establish the offenses charged in Count IV of the indictment, as follows: First: That Irwin A. Schiff, Inc. was a corporation in existence during any portion of the taxable year ending August 31, 1981, and that it was neither a charitable nor a foreign corporation.

Second: Defendant was a person required by law or regulation to make a return for the corporation, Irwin A. Schiff, Inc., for the fiscal year ending August 31, 1981.

Third: That the Defendant failed to make such a return at the time required by law, which time was on or before November 15, 1985.

Fourth: Defendant's failure to make the return was willfull.

As has been said before, the burden is on the government to prove every element of

the offense charged beyound [sic] a reasonable doubt. The law never imposes on the Defendant in a criminal case the burden of producing any evidence or of calling any witnesses.

Every corporation, which is neither a charitable nor a foreign corporatin, in existence during any portion of a taxable year is required to make a return, stating specifically the items of its gross income and the deductions and credits allowed by law. The return shall be sworn to by the president, Vice President, treasurer, assistant treasurer, chief accounting officer, or any other officer duly authorized to act. The primary responsibility for filing a return is on the corporation, not on the Secretary of the Treasury nor any other government official.

Corporation income tax returns are required to be made to the Internal Revenue Service Center serving the Internal Revenue District in which is located the principal place of business or principal office or agency of the corporation, or with the

District Director for such district by hand carrying the returns to the office of the District Director.

Corporation returns made on the basis of a fiscal year such as is the case with Irwin A. Shiff, Inc. must be made on or before the 15th day of the third month following the close of the fiscal year. The fiscal year here ended ago August 31, 1981, thus the return, if required, was due on or before November 15, 1981.

The specific element, the specific intent of willfullness is an essential element of the offense of failure to file an income tax return. The term willfully used in connection with this offense means, voluntarily, purposefully, deliberately and intentionally as distinguished from accidentally, inadvertently or negligently.

The failure to make a timely return is willfull if the Defendant's failure to act was voluntary and purposful [sic] and with the specific intent to fail to do what he knew the law required to be done; that is to say, with a bad purpose to disobey or

disregard the law which requires him to file a timely return which discloses to the government facts material to the determination of the corporation's tax liability.

In determining whether a Defendant acting knowingly and willfully, you may consider, as well, whether the Defendant deliberately closed his eyes to what otherwise would have bebe obvious to him. A finding beyound [sic] a reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge.

Stated another way, a defendant's knowledge of a fact may be inferred from willful blindness to the existence of that fact. You may consider whether or not the Defendant displayed a deliberate indifference or refusal to be informed in this regard. It is entirely up to you as to whether you find any deliberate closing of the eyes, and the inferences which may be drawn from any such evidence.

The Defendant's conduct is not willfull if you find that he failed to fiel a return

because of negligence, inadvertence, accident or due to his good faith misunderstanding of the requirements of the law. Mere negligence, even gross negligence, is not sufficient to constitute willfullness under the criminal law. Neither a Defendant's disagreement withthe law, nor his own belief that such law is Unconstitutional - no matter how earnestly held - constitute a defense of good faith misunderstanding or mistake with respect to the obligation to file a return as charged in Count IV. It is the duty of all citizens to obey the law whether they agree with it or not. If it is shown that the Defendant intentionally violated his known legal duty to file a return, his reason for doing so is irrelevant.

As to Count IV, there is no necessity that the government prove that the Defendant had an intention to defraud it, or to evade the payment of any taxes, for Defendant's failure to file to be willfull under this provision of the law.

The only bad purpose necessary for the

government to prove as to the charge in Count IV, is the deliberate intention not to file a tax return which the Defendant knew not only ought to be and was required to be filed, but which was required to file.

Intent and motive should not be confused. Motive is what prompts a person to act. Intent refers to the state of mind with which the act was done. Good motivation alone is never a defense where the act is done is a crime. One may not commit a crime and be excused from criminal liability because he desired or expected that ultimate good would result from his criminal act. Moreover, if one commits a crime under the belief, however sincere, that his conduct was religiously, politically or morally required, that is no defense to the commission of a crime.

In determining the element of willfullness you must consider that a Defendant cannot be convicted of willfully failing to make a return if he makes a valid claim of his 5th amendment rights against compulsory

self incrimination, or a good faith but erroenous claim of that right. It is the law that the statutory requirement to file a tax return may not do away with a tax payer's right against self incrimination. However, a tax payer may not avoid filing a required income tax return by claiming his 5th amendment privilege against self incrimination unless and except to the extent that the taxpayer believes in good faith that if he furnishes information required on such a return, that the revelation of that information would subject him to incrimination and possible prosecution for violation of the criminal laws.

The 5th amendment does permit a tax payer to withhold information as to the source of income, if the disclosure of such information that is the, the source, would tend to incriminate him. That is, he does not have to indicate the source of the income, if disclosure of the source would tend to incriminate him.

However, a tax payer is not relieved of his obligation to disclose on his income

tax return the amount of the income, even if it is from illegal sources. The 5th amendment does not give a person the right to withhold information as to the amount of his income nor information the disclosure of which does not and cannot incriminate him. If you find that the Defendant received income and that disclosure of that income was not priviledged [sic] under the the 5th amendment and he was required to include the amount of that income on a tax return, then the 5th amendment would not under those circumstances, give any person the right to withhold that information as required on the tax return. In other words, the 5th amendment would not give a person the right to withhold information required on a tax return, if the disclosure of that information would not incriminate or tend to incriminate such person or if the person could not reasonably believe that disclosure of that information would incriminate him or tend to do so.

Thus the law applicable to this case is that a tax payer can comply with the tax

laws and at the same time exercise his 5th amendment rights by listing only the amount of his income and not the source of his income from illegal sources if such be the case, in a space provided for miscellaneous income on the tax form.

If you find that the Defendant erroneously claimed his 5th amendment privilege, by failing to file the returns, as required by law, you may nevertheless find that he acted in accordance with a good faith misunderstanding of the law. Thus, the Defendant's conduct would not be willfull if it was based upon a good faith reliance on the law, including the Internal Revenue Code, the constitution, judicial decisions of the federal courts and advice of counsel, or a good faith belief that the income tax returns did not have to be filed for the years 1980, 1981, and 1982. A good faith belief must be an honest belief, that is, in view of all that the Defendant knew and understood, he must have honestly believed that he was complying with the law.

If you find that the Defendant did not honestly believe that the law could not require him to file a tax return was because of a 5th amendment claim, in view of all that he knew, then his claim that he was not required to file because of the 5th amendment would not excuse him from a legal obligation to file a return.

There has been some evidence with respect to federal reserve notes. Federal reserve notes, on an equal basis with other coins and curriencies [sic] of the United States, are legal tender for all debts, public and private, including taxes and are not in any way unconstitutional. Income received in federal reserve notes is taxable under the law as are other forms of income which have been previously outlined for you.

You are hereby instructed that any good faith belief on the part of the Defendant that the Federal Reserve System or Federal Reserve Notes are not Constitutional does not constitute a legal defense to a willfull failure to file an income tax return.

Knowledge on the part of the defendant that he was required to file an income tax return for the years in question may be inferred from the fact that he filed a personal income tax return for the calendar year 1973 and other prior years. By that fact, however, you are not obliged to infer such knowledge.

The question of whether the Defendant knew that he was obliged to file income tax returns for each or all of the years in question, that is, 1981 through 1982, 1980 through 1982 excuse me, must be determined in relation to all of the evidence.

The 16th amendment to the constitution of the United States granting the Congress the power to lay and collect taxes on income, from whatever source derived, without apportionment among the states is a part of the constitution and therefore is constitutional.

The Defendant makes no claim that he is excused from any obligation to file an income tax return or to pay any income tax, if such is found to be required by law, on

the basis of any disagreement that he may have with the manner, policies, programs or purposes for which the government spends the money derived from the income taxes paid.

You have heard reference to the tax system as voluntary. It is true that many of the acts of persons in relation to the tax law are voluntary in the sense that the acts are performed if the person chooses to do so. This does not mean that the Internal Revenue Code does not create obligations.

To the extent that you have been instructed that the Internal Revenue Code requires certain acts to be done, those requirements are legal obligations. If, under the facts as you find them, one or more of the requirements of the Internal Revenue Code applies to the Defendant, then he would be legally obliged to comply with those requirements. While he may have had a physical choice of whether or nto he would perform the acts required by the law, the obligation created by the law is not

vitiated nor altered by the fact that he may not choose to comply with it. Thus, if under the facts that you find, under these instructions and the Internal Revenue Code, the Defendant was obliged to perform certain acts under the code, the Defendant cannot avoid that obligation by the fact that the actual performance of such acts does not occur unless he chooses to do so. That a taxpayer may or may not comply the law does not excuse that tax payer from an obligation created by the law.

To establish the offense of evasion, as charged in Counts one, two and three, the government must prove, beyound [sic] a reasonable doubt: first, that a substantial federal income tax was due and owing from the Defendant for the calendar year charged in each count; Second, that the Defendant had actual knowledge that such tax was due and owing, and thus was his legal obligation , for the calendar year charged in each count: And third, that the defendant willfully attempted, in some manner, to evade or defeat such tax, with

the specific intent to defraud the government of such tax,

One of the acts that the government claims constituted the attempt to evade or defeat the payment of a tax owed was the failure to make a return. To prove a willfull failure to make a return, the government must prove: First, that the Defendant was a person required by law or regulation to make a return of his income for the tax year in each count; Second, that Defendant failed to make such return at the time required by law: And third, that the Defendant's failure to make the return was willfull.

To establish the offense of a failure to make a return, with respect to the corporation as charged in count four, the government must prove beyound [sic] a reasonable doubt: First, that the Defendant was required by law or regulation to make a return of the corporation's income for the tax year in question: Second, that the Defendant failed to make such return at the time required by law: And third, that

the defendant's failure to make the return was willfull.

You are to determine the guilt or innocence of the Defendant from the evidence in this case soly [sic] in relation to the conduct or offenses charged in the indictment.

The punishment provided by law for the offense charged in this indictment is not to be considered by you in any way in arriving at an impartial verdict as to the guilt or innocence of the Defendant. It is the function of the jury from the evidence that you have heard and from the facts as you find them, applying the law as I have given it to you, to decide the question of guilt or innocence. The question of punishment, if any, is a matter for the Court. Depending of course upon your verdict, but it is not a part of your deliberations. In considering the Defendant's guilt or innocence you should not consider whether or not the Defendant should be punished nor the extent or nature of any appropriate punishment if any.

Any verdict must represent the considered judgment of each juror. In order to return a verdict. It's necessary that each juror agree there to. In other words, your verdict must be unanimous.

It is your duty as jurors to consult with one another and to deliberate in an effort to reach agreement if you can do so consistent with the individual judgment of each juror. Each of you must decide the case for yourself, but only have an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, each should discuss your views and consider the views of your fellow jurors. Each of you should consider and reexamine your own views in light of the views of your fellow jurors. If you become convinced that your view of the evidence is erroneous do not hesitate to change your view. In reaching your decision, do not surrender your honest convictin as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or for the mere purpose

of returning a verdict. In other words, you should feel free to change your view of the facts and the evidence if you become convinced that another view is correct. You should not change your view of the facts or evidence only because others hae a different view, nor just to permit a unanimous verdict.

Remember at all times you are not partisons [sic]. You are judges, judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

Your verdict must be based on a fair and conscientious examination of all the evidence, applying the law as you are instructed to the facts as you find them. In doing so, you must not be influenced by prejudice or bias or sympathy, for or against any party.

I remind you again: do not take any single part of my charge, or any few parts of it, and emphasize those alone. You are to consider the charges against the Defendant in relation to the entire instructions of the Court as an integrated whole in

placing equal emphasis on all parts of the instructions.

Upon retiring to the jury room you should select from among your number, one person to act as your foreperson who will preside over your deliberations and will be your spokesperson here in Court.

When you have reached a unanimous agreement as to your verdict, you will knock on the door and so inform the Marshal. You will then be returned to the courtroom to announce your verdict in open Court.

You will have of course of all of the exhibits and the indictment with you in the jury deliberating room. If, during your deliberations, you should desire to communicate with the Court, please reduce your message or question to writing, signed by the foreperson, and pass your note to the Marshal, who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you return to the courtroom so that I may address you orally and on the record. I

caution, you however, with regard to any message or question you may send, you should not state at any time nor specified what your numerical division or may be as far as the ultimate decision that you're going to have to render.

In other words, don't send me a note and say, tell me that you're six to six or four to eight, or whatever the division may be if you've taken a vote as of that time.

All right. With that, ladies and gentlemen, I will conclude my instructions to you. You may, the 12 jurors retire to the jury room. I'll have all 12 of you for a moment retire to the jury deliberation room, but don't do anything in there at the moment except find your respective lunches, and I will send in the indictment and the verdict form and the exhibits in to you at which time you may commence your deliberations. But in the meantime don't do anything about your deliberations and I will ask, when I send the exhibits in, ask the four alternates then to come back to the courtroom for some further instructions

that I will be giving to you.

So with that all 16 of you may retire to the deliberating room.

(WHEREUPON, the jury then left the courtroom).

THE COURT: I want to, if there are going to be any exceptions, I want the exceptions, any changes in the charge to the group as a whole.

Exception, Mr. Hartmere?

MR. HARTMERE: None, Your Honor.

THE COURT: Mr. Williams.

MR. WILLIAMS: Your Honor, in your explanation of what the amount of taxable incomes was for the years in question, you gave an example only with reference to single persons. It's my contention that the government has not proved Mr. Schiff's marital status for these years beyound [sic] a reasonable doubt, therefore the Court should have given them instructions concerning those who are single and those who are not single.

Your instruction to the jury concerning the bank deposits method I respectfully

except to in its entirety. The government's burden of proving its case involves the requirement that the government have proved that there have been substantial taxable income and a substantial tax due for those years. But the method by which they seek to prove it is up to the government and it's a matter for government counsel to explain in the course of his summation. It makes the Court in effect appear to be an arm of the prosecutor by the government getting in an [sic] explaining what the prosecutor's tactics were what his strategy was. Why he introduced a particular bit of evidence and what the significance of all of that is it makes the Court a commentator on the Government's presentation which is a proper role for summation but not, I submit, a proper role for a charge to the jury.

With respect to that portion of your charge in which you charged the jury that it is not necessary that a tax be assessed, the Court is familiar with Mr. Schiff's position in that respect. It's his

position that it is a requirement and I respectfully except to that portion of the charge.

In your instruction under the heading attempt must be willful in which you describe the fact that an attempt to evade or defeat tax must be willful attempt you stated at one point quoting, It is not necessary that Defendant be shown to have been animated by an evil motive or bad faith. Very respectfullt [sic], Your Honor, I think the cases, and particularly the Poponeno [sic] and Bishop cases have made it clear that the traditional language concerning evil motive or bad faith is indeed precisely what he is meant by willfulness and although I don't know that it is necessary that the Court use the words evil motives or bad faith in defining willfulness it's not a correct statement of the law to say that willfulness is not evil motives or bad faith, evil motives and bad faith are indeed within the laws as I understand it, at least with willfulness.

Your charge with respect to the privacy

act I respectfully except to. I think that is not an accurate statement if indeed as a result of the privacy acts statements a defendant was mislead [sic] into a good faith belief that he didn't have a duty to file, or he didn't have an obligation to pay, if as a result of the privacy act statement he was caused to conclude in good faith that the tax was voluntary, which is what the evidence here shows, then I submit that the privacy act is something that the jury could consider and indeed could provide in a sufficient basis for the jury to conclude that the Defendant acted in good faith, therefore I think your charge on the privacy act is erroneous.

With respect to the charge, the portion of the charged [sic] headed willfulness in which you defined willfulness you went at great length into a charge concerning the deliberate closing of the eyes. You said that in determining whether a Defendant acted knowingly and willfully the Jury could consider whether defendant deliberately closed his eyes to what otherwise

would have been obvious to him. A finding beyound [sic] a reasonable doubt of a conscious purpose to an avoid enlightenment would permit an inference of knowledge. You went on to say a Defendant's knowledge of a fact may be inferred from willful blindness to the existence of the fact. You may consider whether or not he displayed a deliberate indifference or refusal to be informed in this regard and it's up to them to determine whether there was deliberate closing of the eyes. I respectfully object to that. I except to it, Your Honor. I think that that simply is not an accurate statement of the law particularly as the law has been articulated by the Supreme Court in Bishop and Ponponie [sic]. The question is always what did he actually know? What did he actually believe? What did he actually intend? And the deliberate closing of the eyes instruction I submit is inconsistent with that and in fact misleading to the the jury, in that it amounts to a back door should have known quote, unquote should have known charge. Permits

the jury to convict him on the basis not of what he knew but on the basis of what the jury thinks a reasonable person would have known under those conditions; or what this Defendant should have known. That isn't of course the law and thus I think it permits the jury to waiver to avoid addressing an essential element of the offense; and to convict without finding that essential element proven beyond a reasonable doubt.

Your charge with respect to federal reserve notes I'd except to because the Defendant does not claim, and had not claimed at any point in this trial that his beliefs concerning federal reserve notes in any way did constitute a defense or did justify not filing or not paying any tax. And therefore I think what that charge does is create a strawman which then proceeds to knock down creating a prejudice against the Defendant which is unwarranted by the evidence.

Your charge concerning the significance of the filing of a 1973 tax return with reference to the question of what the

defendant knew is, I think is improper because it unfairly singles out one small portion of the Government's evidence, red flags that portion of the evidence, underlines that portion of the evidence whereas in fact that is but one of many factors which the Court has previously ruled the jury should consider, or is permitted to consider in deciding what the Defendant knew or did know, believed or didn't believe. I think that it creates the impression of partisanship on the part of the Court for the Court to single out a particular piece of the Government's evidence in that respect, and therefore is unfair.

With respect to your charge on voluntariness, the filing of tax return is not voluntary, Your Honor is familiar with Mr. Schiff's position that the tax is voluntary and for that reason I respectfully except to that.

Also, Your Honor, for the record I would respectfully except to your failure to charge a requested, my paragraph number

five concerning the bias of an employee in favor of his employer. I submit that charge was particularly appropriate and indeed necessary with reference to the I.R.S. Attorney who was called by the government and presented as an expert witness. That the fact that he happens to be an employee of the Plaintiff in this lawsuit is a factor which the jury should be permited [sic] to consider in decideing [sic] whether to credit his testimony as an expert witness.

And also I respectfully except to your failure to use the language contained in my paragraph number ten, in that it is our contention that if the jury found that the Defendant in fact relied upon the advice of an accountant or the advice of an attorney, that that would constitute an absolute defense to the charges contained in counts one through four and thus would be more than merely one of the factors to be weighed by the jury in reaching a conclusion as to what he believed.

That, I believe, completes my exception.

THE COURT: All right. Thank you. Your exceptions are noted, Mr. Williams. I will not charge further. Let me ask you. Are counsel in agreement that if two exhibits of which two, three extra copies, of the books are all to go to the jury?

MR. WILLIAMS: Your Honor, and also the Government's work sheets which there are extra copies that those are also for the jury.

THE COURT: Is that agreed?

MR. HARTMERE: Well Your Honor --

THE COURT: If 34, How Anyone Can Avoid Taxes, Moltz and the Biggest Con.

MR. HARTMERE: Yes.

MR. WILLIAMS: Also I think that the equipment for the playing of the tape, audio tapes

* * *

THE COURT: Now, I have, and will mark as Court Exhibit Number 4, the following notes. The jury panel requests his Honor to repeat the portion of his charge with regard to the third element inherent to the three counts of the indictment. I take it

when they say the three counts they mean the first three counts. I'll ask them that but I think that's clear. It's my proposal as I've discussed with you from the page denominated essential element of offense of attempting tax evasion to read the third element, to tell them that this is what they have requested that I do and this is the way that I'll handle it. This is a position of the charge and that as I indicated to them earlier even though I'm now, in response to their request only reading a portion of the charge, that they should understand that this is only a portion of the entire charge and that they must apply the entire charge as the law of the case. Then what I would propose to read would be the page and a half that starts attempt to evade or defeat a tax defined. The page that is captioned attempt must be willful. And the page that is captioned willfully to act or to omit and it is my understanding, having reviewed this with the two of you in chambers before I came out, that that is your agreement.

Is that correct?

MR. WILLIAMS: I believe that's responsive to their question, Your Honor.

THE COURT: Mr. Hartmere?

MR. HARTMERE: Yes, Your Honor.

THE COURT: All right. Summon the jury please, Lori.

(WHEREUPON, the jury then came into the courtroom).

THE COURT: Ladies and gentlemen, I have had a request from your foreperson, and that has been marked as Court Exhibit Number 4. As I've told you before, everything that we do we make a record of. So that if there's ever any question about how something is handled there's a record to which somebody can refer. Instead of my referring, I've got it in front of me I know what I'm talking about. If subsequently somebody has to look at this matter, they know that what I'm talking about is Court Exhibit Number 4. I'll read the question that you put. The jury panel request his Honor to repeat the portion of his charge with regard to the third element

inherent to the three counts of the indictment, and it's signed.

Now, when I read that question I take it that what is being requested is instructions with respect to the three Counts of evasion which are the first three counts of the indictment.

You should understand that what I'm going to read to you is in effect a rereading of a portion of the charge as I earlier gave it to you, and as a portion, while it is going to be given to you in response to your specific question, you must keep in mind that it is only a portion of the entire charge. And because I am rereading it to you it's only because it's in response to your question and it is not to be taken out of context and in disregard of all the rest of the charge because you are to apply, as I told you earlier, the entire charge in your deliberations and in coming to a verdict.

With that observation I will read, reread what I think is the portion of the charge that responds to your question.

If, of course, it is not entirely responsive you should feel free to send me another note and request for further reading of whatever additionally you might specify that you want to have.

I did tell you that there were three elements of the offense charged in Counts 1, 2, and 3 and the third element which you have directed my attention to read as follows: That the Defendant willfully attempted, in some manner, to evade or defeat such tax, with the specific intent to defraud the government of such tax.

To attempt to evade or defeat a tax involves two things: First, an intent to evade or defeat the tax; and second, some act willfully done in furtherance of such intent.

So, the word attempt requires that the Defendant had knowledge and understanding that, during a calendar year, he had an income which was taxable and which he was required by law to report; but that he nevertheless attempted to evade or defeat the tax thereon by willfully failing to

report all the income which he knew he had during such calendar year and which he knew it was his duty under the law to state in his return for such year; or by some other act or course of, or by some other act or course of action, the purpose of which was to evade or defeat the payment of the tax.

Defendant is not merely charged with failure to file tax returns; he is charged with evasion, and thus he must be proven to have taken some action for the purpose of evading or defeating payment of a tax. This means more than that he merely failed to file a tax return which the law obliged him to file. While failure to file may be an act of evasion, if evasion was his purpose, the government must prove an act or acts the purpose and intent of which was specifically to evade or defeat the payment of a tax which the law requires Defendant to pay.

Various schemes subterfuges and devices may constitute an attempt to evade or defeat a tax. The statute makes it a crime willfully to attempt, in any way or manner,

to evade or defeat any income tax imposed by law. It is for you to determine whether the Defendant did have the intent to evade or defeat a tax which he owed and whether he acted willfully so as to accomplish, or attempt to accomplish, the evasion or defeat of such a tax.

The attempt to evade or defeat the tax must be a willful attempt. That is to say, it must be an attempt made voluntarily and intentionally, and with the specific intent to evade or defeat a tax imposed by the income tax laws, which was the legal duty of the Defendant to pay to the government and which the Defendant knew it was his legal duty to pay. A mere failure to file is not a basis by itself to sustain a conviction under Title 26 of the United States Code, Section 7201. That's the evasion section. The government must prove that the Defendant failed to file returns for the purpose of evading or defeating a tax in order to prove that the act was willful.

In other words, the attempt must have been made with the bad purpose of willfully

seeking to defraud the government of some substantial amount of income tax lawfully due from the Defendant. It is not necessary that the Defendant be shown to have been animated by an evil motive or bad faith. It is enough if it is shown that the Defendant acted willfully for the purpose of attempting to evade or defeat the payment of such a tax.

An act or a failure to act is willfully done if done voluntarily and intentionally with the specific intent to do something one is aware the law forbids or with the specific intent to fail to do something one is aware the law requires to be done; that is, with a bad purpose either to disobey or to disregard the law. An act of omission is not done intentionally if done inadvertently.

Those are the sections, I think, ladies and gentlemen, that, in response to the question that I can best cull out of the entire charge as answering the question that you put to me. As I said if that does not answer your question and you wish any-

thing further to be read from the charge, feel free to ask, and that having completed what I think answers your question I will excuse you and you may return to your deliberations.

(WHEREUPON, the jury then left the courtroom).

THE COURT: All right. Anything further, counsel?

MR. HARTMERE: No.

MR. WILLIAMS: I want to say for record I'd like to reiterate to the extent applicable this portion of the charge those exceptions I previously have taken.

THE COURT: Yes. I remember those. Okay. We'll stand in recess again.

(Short recess).

THE COURT: Summon the jury, please.

(WHEREUPON, the jury then came into the courtroom).

THE COURT: We'll take one thing at a time. I have your last request which counsel have not seen or don't know about. But I will be, first of it would be Court Exhibit 5 which reads, please re-read the

section of his Honor's charge to the jury concerning one, intent to defraud. Two, state of mind, three, ones interpretation of the law, is not a defense in and of itself. And the third is in quotations.

First of all, in the third element that I read to you originally and then read the last time you came in, I read to you as follows: This is the third element of the count under the first three counts. That the Defendant willfully attempted, in some manner, to evade or defeat such tax, with the specific intent to defraud the government of such tax.

Now, I have not, in the course of the charge, amplified that so as to define for you anything more specifically what is meant by defraud, except as follows: In other words, the attempt must have been made with the bad purpose of willfully seeking to defraud the government of some substantial amount of income tax lawfully due from the Defendant.

In effect, it is enough, you were instructed, if it is shown that the

Defendant acted willfully for the purpose of attempting to evade or defeat the payment of a tax.

Now, those are the only references that I can recall specific use of the phrase, intent to defraud. And in essence what it is the same thing really as the element of intending by some act, to evade or defeat the payment of a tax.

That's why I use the phrase, in other words, the attempt must have been made with the bad purpose of willfully seeking to defraud the government, that is to deprive the government, of some amount, some substantial amount of income tax lawfully due from the accused, from the Defendant.

Now, I think that I have therefore answered the first of your questions. If I have not, then please feel free to be more specific in the request that you want me to give to you. Give you the answers to.

Second thing that you've asked, is reread the sections of the charge concerning state of mind.

In the third element that I read to

you, there is specifically the requirement that there be proof that the Defendant willfully attempted with the specific intent of evading or defeating the tax.

Willfulness I have defined for you several times in the course of the charge, and obviously willfulness is what goes on in a person's mind. What their intent, what their purpose, what their motivation, what their thinking process was and that's what is somewhat generally referred to as ones [sic] state of mind. And I'm not sure what you really want me to instruct you further on in that request, so therefore having told you what the general concept that state of mind is, as it's involved in this case, I will have to leave it to you to tell me whether you want me to do is in effect define the terms willfully, and intentional as I have instructed you with respect to that third element.

But again I will leave that to you to tell me what it is that you want.

The third request you have is in quotation marks. One is, ones [sic] interpreta-

tion of the law is not a defense in and of itself.

Now, that phrase is not actually found in the charge anywhere. And there is, for example, an indication as part of the charge that a defendant's disagreement of the law that suggests that he knew what the law was but he disagrees with the law, no matter how earnestly held, does not constitute a defense of good faith misunderstanding or mistake.

But I'm not sure that that is what this third request intends to ask of me. And therefore as you know, there is a claim that the Defendant, one, did not know that he was obliged to file on the returns and to pay the tax. Secondly, that he did not understand that the law, as he knew it, required him to file a return and pay the tax.

* * *

(Opened at 10:00 A.M.)

THE COURT: Mr. Williams.

MR. WILLIAMS: I was under the impression they were going to start deliberating.

THE COURT: They were and within three minutes after they went in there a note was sent to me.

MR. WILLIAMS: Sorry.

THE COURT: Let me read to you what I have. One, may we have Judge's opening remarks reread? Specifically he elaborated on the defendant's state of mind as an important element to the jury panel's consideration.

Now, we haven't been able to find those remarks. In some respect they are in essence redundant and more general statements than were made ultimately in the charge. Is there any problem that I just simply have those reread by the Court Reporter?

MR. WILLIAMS: I don't think so.

THE COURT: Okay. Well, we will do that for them and I will have that reread.

Second, may we have an interpretation of how state of mind is to be considered in the meaning of the work [sic] willful?

MR. WILLIAMS: I thought that is what all the instructions handed to them was

about.

THE COURT: Well, what I am inclined to suggest that I do in response to that, is just simply say to them that the question of willfulness is a question of what was his state of mind. In other words, what was his state of mind during the period of time in question and was anything that they find in the way of acts, if they find any, that are pertinent to the charges in this case, were they done willfully? And for that question I can only refer them to what I have told them what would constitute willful conduct. I mean, it seems that what they have is a problem leaping the gulf between the state of mind as maybe being separate and apart what I have told them about intents and willfulness. So I am not inclined to try to charge them about the state of mind as such because state of mind really is not an element in this case in the sense that as an entity unto itself or a concession unto itself. It is a question of what willfulness and intent are which is, of course, a state of mind.

MR. WILLIAMS: It is and in fact of course, a state of mind goes to most of these issues and --

THE COURT: Yes, of course.

MR. WILLIAMS: It is very, short of having a sit down dialogue --

THE COURT: Yes.

MR. WILLIAMS: -- which is what they want, but obviously something we can't give them.

THE COURT: I am inclined to reread the first thing and then say to them something to the effect that, look, the elements of this case, the third element that I have read to you before and that you have already tells you that willfulness and intent are important aspects of the third element of this charge of the offense. They had the charge and they can read it. That the question of willfulness and the question of intent must be determined in the frame work of what was the defendant's state of mind and that state of mind is not to be considered as a concept separate and apart from the elements of willfulness and

intent in which they are, for all intent and purposes, trying to determine what the government has proven with respect to the defendant's state of mind. And that for guidance in making their determination they have the instructions with respect to both intent and willfulness to which I would be obliged to refer them and leave it at that.

Do you see any problem with that, Mr. Hartmere?

MR. HARTMERE: I think that is fine Judge.

THE COURT: Mr. Williams?

MR. WILLIAMS: I think what you are saying is correct, your Honor.

THE COURT: Well, that's what I will do then.

MR. WILLIAMS: Before they are brought in, last night in the course of a discussion with Mr. Schiff, I came to the conclusion that there was something I should have noted even at our charge conference in respect to one aspect of the charge and I had not. It may or, I don't know if it is too late or not. I will like to bring it

up with the Court if I may and that has to do with the portion of your charge in which you give examples of the kinds of things that may constitute evidence of evasion. I am looking to see if I can, I think it is under attempt to, or attempt to defeat or evade a tax. No. Evidence of willfulness. In the second paragraph by way of illustration only and you give some examples.

THE COURT: I will see if I can find it. Go ahead.

MR. WILLIAMS: I think that the problem with those examples is not that in and of themselves they aren't or right, but that they are inadequate and that what is given there is a list that is less than what I think Congress had in mind when it wrote the statute and what the Supreme Court had in mind in the Spies case. As a matter of fact, I was, obviously in my own mind, I had it that your Honor was going to be charging along the lines of the Spies decision and in fact I so argued to the jury and obviously that was just, I looked at this paper and I saw something other

than was there because I am so accustomed to reading the language from Spies because what you have done here is, you have significantly abbreviated the examples and it seems to me that the full range of examples that come from Spies and incidentally come from the Legislative history is necessary to give the full flavor of what indeed is intended. In the case of Spies I refer you to 317 U.S. at page 499. The Court says, the language I believe it is that standard language for a charge in an evasion is by way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up of source of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any kind of conduct, the likely effect of which would be to mislead or to conceal.

That language also appears is quoted in, I think, yes, in the sentence in the judiciary's committees reports on the opposed criminal code 1979 in which the 96th Congress second session report number 96-553 at page 438 that was published on January 17, 1980 in which they say the overwhelming majority of current criminal tax evasion prosecution under Section 7201 involved the filing of fraudulent income tax returns. They go on and discuss that and they quote this very language that I just read to the Court as being demonstrative of what Congress had in mind. Similarly, in 1977, when the Criminal Code 77, that appears in National Report 95-605 which was filed November 15, 1977 at page 426 they use that identical quote.

I think it is clear that Congress all along has intended and the Supreme Court has felt from the beginning that this standard illustration, while it does not provide the outer limits, the best description of what indeed is intended in this suit. I think that the error that the

Court made, and I inadvertently participated in by not calling it to the Court's attention is in abbreviating that set of examples, although it is certainly that it is not necessary, for example, to keep a double set of books, it is not necessary to have false entries and so forth in order to be guilty of evasion. That giving that range of examples sets, conveys to the jury the kind of thing that Congress and the Supreme Court have in mind and interestingly enough that may be helpful to the jury in responding to the very question that they have addressed to you this morning. Because although it does not in terms define the kind of behavior that suggests an intent to evade, or it certainly illustrates it and I think it, in many ways, is the best way of explaining what the law does mean in reference to the state of mind, and I would ask the Court to recharge the jury with that quotation from the Spies case in those words just to quote from page 499 of Spies suggesting to the jury that that language might be taken in

light of that portion of the charge they have with them in the jury room and that it may help to explain that aspect of the problem. I do think that is what the law requires and since the jury hasn't returned a verdict and is still deliberating, it is not I think too late to cure the problem.

THE COURT: What is the Government's position in that regard? Do you agree or disagree?

MR. HARTMERE: I disagree. I don't think the jury has done much deliberating yet.

THE COURT: I don't know what they have done.

MR. HARTMERE: The quote from Spies begins, consistent pattern of understatement of income. There has been no -- you can't quote, you can't give that quote from Spies. First of all the defendant didn't file tax returns.

THE COURT: That's the reason why I trimmed the language frankly, Mr. Hartmere and Mr. Williams. I trimmed it to eliminate things that were just, it seems

to me perhaps unfair to your client by hanging him up against a set of illustrations that may not apply here, so therefore that's the reason I have done that. But more importantly at this point in the proceedings, since that is not controlling as far as their deliberations are concerned, I think it would be to emphasize unduly illustrations that really don't apply to this particular case and therefore I am going to deny the motion to reopen the charge and I am not going to charge further because I think it would not be helpful to the jury and frankly, at this stage of the game would emphasize one very limited aspect of the attempt to help the jury in their deliberation process.

MR. WILLIAMS: Would the court consider as an alternative perhaps simply preparing a substituted page rather than calling them out here and reinstructing them as kind of a modification, a substituted page in which in that paragraph you, after the words, by way of illustration only, you substitute the Spies language for the language that

you have used?

THE COURT: No. I think that frankly would be improper for the same reason.

MR. SCHIFF: I want a two minute discussion, with my attorney on this.

THE COURT: Don't you interrupt these proceedings. If you want to talk to your attorney you talk to him. Don't talk to me.

MR. SCHIFF: How can I talk to him?

THE COURT: You talk to him simply by talking to him.

MR. SCHIFF: He wants to talk to you. Let me talk to you.

THE COURT: Any time you want to, Mr. Williams, stop in order to have an opportunity to talk to Mr. Schiff, please don't hesitate to.

MR. WILLIAMS: Very well. Thank you, your Honor.

The point Mr. Schiff wanted me to emphasize to the Court, and it was already made, I may be mistaken, is that language that the Court used in contrast to the language used by the Supreme Court in

Spies and the Congress in its various reviews of that statute, the language that the Court uses understates the gravity of the offense as contemplated by the Congress, and thus conveys an incorrect impression to the jury about what it is that must be found to constitute evasion or if you will the intent to defraud and so in thus evaluating what Congress had in mind increases the likelihood of a conviction based on marginal activity like, for instance, the use of a blue pen which clearly in and of itself was not what Congress had in mind in passing the evasion statute.

THE COURT: I think you have made that point previously, Mr. Williams, but if you haven't I don't think that what you have said changes the basic argument that you make. At this point in the proceedings, because of the nature of what is involved as not being controlling on a specific element of the offense which I think has been amply and adequately reiterated, and defined and explained as best I can do it

to the jury, I think that to amend the charge at this point because of this would not be proper and therefore I will adhere to my earlier ruling.

MR. WILLIAMS: I except to that.

THE COURT: Now, I don't do it to any significant degree that so maybe the answer to the two questions I've got before me can be answered together, i.e., that --

MR. HARTMERE: I would suggest that as the safer course of action in any event, Judge, the real instructions on the law come during the instructions. Anything else was introductory.

THE COURT: If they had asked for a specific thing and we can identify it, I would be inclined to read it. Since we cannot, and apparently didn't deal with anymore extensively than obviously much less so then I did at the time of the charge, I think what I will do is simply do what I suggested to you with respect to the second question, and then just tell them that the opening remarks should be controlled by, or their consideration of the

issues should be controlled by the final instructions. That the opening remarks were only intended to introduce the questions in a very broad outline to them.

Any disagreement with that, Mr. Williams?

MR. WILLIAMS: I don't disagree with that.

THE COURT: Summon the jury.

(Whereupon, the jury then came into the courtroom).

THE COURT: Good morning, ladies and gentlemen. I want you to know that I have had your notes since a few minutes after ten, but I had another proceeding before me for awhile after ten o'clock. I have been on since nine o'clock this morning and I couldn't interrupt. In consequence by the time we got a chance to look at your question, it was probably the better part of closer to 10:30. We have looked through the court reporter's transcript notes of the opening remarks and we cannot find any specific, as you referred to in the first request, elaboration of the question of

defendant's state of mind. What we are trying to do is, if you had something specifically in mind it might be helpful to you, I was going to read that and counsel would agree, but, we couldn't find anything in which there was any significant elaboration on that question. So therefore, I am going to answer both of your questions which I am going to read for the record, I am going to answer them together.

The first question is, may we have the opening remarks reread specifically he elaborated on the "defendant's state of mind" as an important element to the jury panel's consideration.

And the second question is, may we have an interpretation of how "state of mind" is to be considered in the meaning of the word "willful"?

As I have told you and, I don't have the charge now in the form that you have it, I have got a copy. That's all right. You keep it. I have told you that the third element of the first three counts and the fourth element of the fourth count is

couched in terms of willfulness.

In other words, the third count in the first three are the third elements in the first three counts is that the defendant willfully attempted in some manner to evade or defeat the tax with the specific intent to defraud the Government of the tax. And the fourth element of the fourth count is defendant's failure, that is the failure to make the return on behalf of the corporation was willful.

I think the confusion that may exist is that there is, with respect to these charges, the question of willfulness and the question of intent.

In other words, the statute specifically provides, and therefore the Government is obliged to prove that the acts that they claim, and it is for you to decide whether there were any such acts, but the acts that the Government claims constituted the evasion or the attempt to evade were done willfully. And then in the fourth count that the failure to file the return was willful.

Now, whether somebody does something willfully and intentionally has to be considered in terms of what was in their mind. So that's where we sort of have generally referred you to the defendant's "state of mind". State of mind is not a separate and additional factor in the case to be considered by you nor is it conceptually a different factor from the elements, the necessary elements that the Government must prove, i.e., willfulness and intent.

Or the definitions of what is willful and guidelines as to what is willful and what is intentional, I refer you to the charge which you have and which I have tried to outline and explain to you how you go about determining whether an act, if you find an act,mind you that is a factual matter that you are to decide, whether the acts if any you find were in fact willful and intentional. In doing that you must determine what was the defendant's state of mind in the years in question, but your determination should be whether or not the Government has proven beyond a reasonable

doubt that any acts that you may find he committed or any omissions constituted a willful attempt in some manner to evade or defeat the tax with the specific intent to defraud the Government of such tax. And in the fourth count, whether the failure to file was willful.

Now, I think that I hope I have dispelled the concept that you may be laboring under which maybe I created a misunderstanding. But what I am trying to say is that in talking in terms of your consideration and determination of the defendant's state of mind, what I was referring to was, you must make that determination as to whether the Government has proven its case beyond a reasonable doubt in terms of whether or not there was willfulness in the conduct that you find to, to whatever extent you find that the defendant's conduct has been proven in a way that that is relevant to this case.

Now, I think therefore that I have answered your question and with that I will ask you to resume and I am sorry I didn't

get back to you earlier. We were trying to find if there was something that was specific in the remarks that I had made.

So I think that I will ask you to resume your deliberations and if I haven't answered your question I am sure you will be back again.

All right. You may be excused.

(Whereupon, the jury left the courtroom to continue their deliberations.)

AFTERNOON SESSION

(Opened at 2:00 P.M.)

THE COURT: Exhibit 10.

THE CLERK: Yes.

THE COURT: Exhibit 10 reads, on page 18 of the Court's instructions to the jury, Section 7201 as read, "any person who willfully attempts in any manner to evade or, underlined, defeat any tax shall be guilty and so forth. The indictment reads, "evade and underlined". Question. Which controls?

MR. WILLIAMS: The indictment clearly. Clearly because they have specified in the indictment what he is accused of-doing.

THE COURT: Supposing they fail to prove one?

MR. WILLIAMS: First of all, your Honor, I think it is truly an academic question in this respect. I think the law is clear that there is no distinction. I don't know of any authority. Maybe Mr. Hartmere does. I don't know of any authority that would permit a verdict under 7201 without a finding of evasion as that term has been defined by the case law.

THE COURT: I haven't seen the indictment. I don't know. I presume they are accurate.

MR. WILLIAMS: They are. There is a fair amount of case law which obviously I don't have at my fingertips which says that when the government pleads in the conjunctive they must prove in the conjunctive. However, I truly think, I don't see there is any disputes, any basis for disputing that in this case. That is completely academic. This is the tax evasion section. It cannot be convicted under it unless there is a finding of evasion as that term

is found in the case law. There is just no contrary authority.

THE COURT: I am frank to say I never had to deal with the question.

MR. HARTMERE: I haven't either, your Honor. That is why I haven't responded. I suppose the answer is, although Mr. Williams' argument has some initial appeal itself, that doesn't really answer it because it is not, the Government doesn't claim that he attempted to evade and he attempted to defeat. It is the attempt that we are on trial here for. It is not again whether he's successful or not. In our opinion it wasn't successful because we were able to recompute what we did to some degree.

MR. WILLIAMS: That ducks it, though. It's the question of mental that goes back to the mental state.

THE COURT: To a certain degree you are right.

MR. WILLIAMS: The mental state is obviously the same.

MR. HARTMERE: I think it would be

either one, frankly, if you attempt to do either one.

THE COURT: Mr. Williams says there's no difference.

MR. HARTMERE: I don't --

THE COURT: If there is no difference that raises the question, why do they put them both in?

MR. HARTMERE: I think there is a difference.

MR. WILLIAMS: It seems to me, your Honor, that there are such things as prosecutions for under the payment situation under 7201, am I --

THE COURT: Evade the payments. I mean defeat the payment of a tax.

MR. WILLIAMS: That's a different question and that's not what he's accused of.

THE COURT: No. And this is in the statute that's what I am going to get, the statutes to look at it. The statute says, and defeat the payment of a tax. That's why the evasion I think is different in all candor, Mr. Williams, because I think the language defeat, refers to defeat the

payment of the tax.

Now, this is probably a very subtle difference.

MR. WILLIAMS: He can't be, well, --

MR. SCHIFF: It's void.

MR. WILLIAMS: Just a minute now.

Well, if this new amendment, if the proposed revised view of the statutes were adopted, it would have to be void for vagueness, but I can't imagine that it could be adopted and be consistent with the law. I would suggest that there has never been a case which it has permitted a person to be convicted under 7201 without meeting the requisites for a factual finding of evasion. Obviously we are talking about attempt to evade, but the evasion requirement as it applies to state of mind is an essential requisite for conviction.

THE COURT: Well, my memory was not correct. It says, any person who willfully attempts to evade or defeat any tax imposed by this entitlement or the payment thereof. If there is no distinction as a practical matter for this case I suppose we could

tell them that there is no distinction and therefore they shouldn't, they needn't concern themselves with it, i.e., our observation, Mr. Williams, that it is an academic question.

However, if that is not true, if there is a difference between evasion and defeating tax, then if the government proves only one and didn't prove both, wouldn't they still be entitled to convict?

MR. WILLIAMS: No, your Honor.

THE COURT: Why not?

MR. WILLIAMS: Because they have pleaded conjuntively [sic] and we are, our motion for bill of particulars was denied in to to. We have been put to trial with the understanding that the Government could not prevail without proving evasion specifically. Our entire strategy has been formulated upon that belief which is based squarely on the language of the indictment and our efforts to get further clarification in a bill of particulars were rejected. So therefore, there would be overwhelming prejudice to this defendant to

permit him to be convicted on a different theory than that of which he was notified. He has, of course, been thereby, would thereby have been denied his constitutional rights to be notified in advance of trial of the nature and cause of the accusation against him and afforded an opportunity to prepare for trial and to enjoy the effective assistance of counsel.

MR. HARTMERE: I fail to see that argument in light of Mr. Williams' statement that he believes they mean the same thing. In any event how the trial preparation could have been any different is beyond me. Certainly the figures wouldn't have changed nor could his theory have changed since it's a lack of willfulness. I think this is simply a situation perhaps where to go to a different type of offense if one pleads, for example, which has been done in this District, theft of Government property and includes more than one item, the charge usually is along the lines, if any one of those items has been proven, the defendant should be found guilty. It

doesn't matter that they were named in the indictment for double jeopardy purposes it's the same defendant is protected.

In this particular case all of the prove [sic] was the same no matter what.

MR. WILLIAMS: Well, the government of course takes the position it's going to throw in everything it has regardless of the statements in the indictment, but our whole approach to the defense of this case obviously has been predicated upon showing the lack of the mental state required for evasion. That's the whole point of this case and indeed you need look no further than my arguments to the jury. But indeed that everything, every single moment of this case from the beginning down to today has been premised on the idea that evasion is what the government must prove beyond a reasonable doubt before it can convict. And counsel's argument that I think that evasion and defeating are the same thing, it doesn't address that really because it remains that I do think they are the same thing but I think they are both what is

covered by the definition of evasion of that consideration are required in the statute but even if I am wrong in that interpretation I have always believed that evasion was what the Government had to prove and the Government has so pleaded. I have never been given any hints of a different theory in this case. Moreover, you have always consistently instructed the jury from day one on that theory, Mr. Hartmere argued that theory himself to the jury. Mr. Hartmere did not suggest to the jury at any point either in the presentation of his evidence or in the making of his oral argument that they could convict this man without finding evasion. Very much the contrary. So we have both in fact proceeded on that assumption.

THE COURT: What you are saying, Mr. Williams, is that evasion is the heart of the case as far as you are concerned.

MR. WILLIAMS: That's right.

THE COURT: And that you would strenuously object if the jury were permitted in some form to convict your client on the

basis that he defeated or attempted to defeat a tax or the payment of a tax without also being found to have evaded.

MR. WILLIAMS: That's correct.

THE COURT: Put the shoe on the other foot. My first question is, is there a shoe to be put on the other foot? You previously said you didn't think so. You thought they both were the same.

MR. WILLIAMS: That's right.

THE COURT: Only trouble with that, but you then get into a situation, well, can he be convicted of evasion without being also found to have attempting to defeat a tax if we assume that there is a distinction?

MR. WILLIAMS: Well, I think there is a distinction that defeating is entirely subsumed in evasion in any event because the evasion would constitute, by definition, an attempt to defeat.

THE COURT: As you sit here I'm trying to find out whether, in my mind, there is a distinction that I can put to you and ask you to tell me whether it is there or not, and I had difficulty, but I have also the

difficulty in the statutory principle construction, principle that Congress doesn't put words in if they are not intending to mean something and if they have put in the separate words, or defeat, they intended some different concept, but the interesting thing is my quick perusal of the annotation does not suggest in the breakdowns of the cases that the cases have been distinguished.

MR. WILLIAMS: Precisely my point. No person, to my knowledge, has ever been convicted under 7201 without a finding of attempt to evade. I don't believe there has ever been such a case.

THE COURT: Just from the case notes, Mr. Hartmere, on the separate offense category of the cases as they are broken down in the annotation, it repeatedly suggests that separate offenses are involved where charges made under the section with respect to different years and therefore it is not a single offense that is deemed to be a continuing offense. However, there is one case in Illinois where,

and I again quote from just the notes in the annotation which I haven't had a chance to look at the case itself, this section providing fine or imprisonment for attempts to evade or defeat tax defined two separate crimes. One, attempt to evade or defeat tax and two, attempt to evade or defeat payment of tax.

Now, it says at least two.

MR. WILLIAMS: My understanding has been, and your Honor and I of course am not a tax lawyer, but in trying to prepare for this case and reading the books and listening to the seminars and all the rest of it and talking to people in the field, my understanding has always been that those two crimes you have just recited, or the two crimes that are alleged by Section 7201 and it is further my understanding that it is clear to see a prosecution for attempting to evade or defeat the payment though I guess it's considered to be at least theoretically possible.

THE COURT: Well, I can see how somebody could be attempting to evade the tax

in the sense of the imposition of the tax. The establishment of the liability for the tax in a sense of an amount.

MR. WILLIAMS: Yes. Exactly.

THE COURT: Hiding the assets, hiding the records.

MR. WILLIAMS: That's right.

THE COURT: Fabricating the records.

MR. WILLIAMS: That's basically what we have a version of here.

THE COURT: That's right. We are not talking about here except with respect to some limited aspects. For example, the trusts are claimed in essence I suppose to be an aspect on which they might find that there was an attempt to defeat the payment of the tax.

MR. WILLIAMS: I don't think that's the claim. I thought the claim was --

THE COURT: I'm not --

MR. WILLIAMS: It showed a general state of mind that somehow reflected --

THE COURT: We haven't distinguished it and it hasn't been specifically discussed and the payment question has never been

raised as subject of reference and I didn't submit it as a separate matter. However, I find nothing to suggest that anyone has ever distinguished in writing on the subject in any case holding. And indeed several of the cases talk in general terms of evasion and just to skip the word defeat.

I think what I would be inclined to do, because it may be totally an academic question, is to tell them that for the purposes of this case the two terms may be regarded, since what's claimed is an attempt to evade, what is claimed as an attempt, that the two terms need not be distinguished for their purposes and they may therefore regard themselves as controlled by the indictments and that they need not make a distinction between the terms evade and defeat.

MR. WILLIAMS: I think that --

THE COURT: First of all, find out, does that satisfy your position in the matter, Mr. Williams?

MR. WILLIAMS: I think that there is

such a sliver of danger left in that approach that might therefore think that evade means defeat. Whereas it would be a more accurate statement to say that defeat means evade.

THE COURT: I wasn't going to say either. I was going to say, for purposes of this case that they need not make a distinction between the two.

MR. WILLIAMS: They only seem to be people who have the idea that they can figure these things out for themselves.

THE COURT: They had asked an awful lot of questions.

MR. WILLIAMS: Some of them are kind of oddball questions.

THE COURT: Should I tell them that?

MR. WILLIAMS: No. Mr. Hartmere will tell them that.

THE COURT: I can tell them that and attribute it to him.

MR. WILLIAMS: I think that they should be told for the purposes of this case the indictment controls and they may not return a verdict of guilty unless they find

specifically an attempt to evade.

THE COURT: I am not going to tell them that. I am not going to tell them how they should decide the case and not suggest what they should do.

MR. WILLIAMS: Judge, that is what they are required to do.

THE COURT: I understand that. In the sense that they, that's in essence the same thing that I would tell them. If I told them that for the purposes of their consideration of this case they need make no distinction between the two and that therefore to answer their question they may regard the indictment as controls.

MR. WILLIAMS: I think then what you should say is, if you are going to approach it that way and not take up my suggestion, then what you should do is not get into the business of whether there is or is not a distinction and simply say, the indictment controls.

MR. HARTMERE: I don't agree with that, Judge.

THE COURT: That suggests and leaves

hanging what you claim is not the case.

MR. WILLIAMS: Okay. But if you are going to do that, if you are going on and say, they mean the same thing, then the danger is --

THE COURT: I wasn't going to say that. I was going to say, the purposes of this case, remembering that what is claimed here is an attempt to evade and defeat that for the purposes of this case, they need not make a distinction which means that the indictment controls.

MR. WILLIAMS: And that the indictment controls.

THE COURT: I am not going to tell them they mean the same thing.

MR. WILLIAMS: I see what you're saying.

THE COURT: You agree to that then?

MR. WILLIAMS: Well, I prefer --

THE COURT: Alternative to your --

MR. WILLIAMS: I can't say I'm agreeable. I think what you should do is what I suggested, but I, beyond that, I have no further objections to it.

THE COURT: All right. Mr. Hartmere?

MR. HARTMERE: That's fine, Judge.

THE COURT: Bring the jury in.

(Whereupon, the jury then came into the courtroom.)

THE COURT: Exhibit 10 reads, on page 18 of the Court's instructions to the jury title statute defining offense in count one, two and three, Section 7201 of the code title 26 provides in parts, "any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall be guilty, and so forth. The indictment indicates, "evade and defeat". Which one controls?

Keeping in mind, ladies and gentlemen, that what is claimed in this case and what is charged is that the defendant attempted to evade and defeat a tax. For the purposes of your consideration of this case, no distinction need be made between the two terms, evade and defeat. And therefore for the purposes of your deliberations the indictments would control.

All right? I trust I have answered the question.

Now, you need to make a phone call?

A JUROR: Yes, your Honor.

THE COURT: You want to make it at the pay phone or make it in private?

A JUROR: Pay phone.

THE COURT: I will just ask you that you all return to the jury deliberation room, but I will ask you can go ahead and go directly up and make the phone call. If you want to use the phone in my chambers, you are welcome to do that.

A JUROR:

THE COURT: Do it in my chambers so that you keep away from whatever is going on out in the rest of the courthouse.

So if, when we get through here, just come back and come in through here and into my chambers. The rest of you, if you would please, when you go back in the deliberating room, you will wait until your leader has returned. Just simply, because any deliberations that you should have should include all of you. Okay? All right. I

will ask you all to go back with the exception of the foreman and you can come on in through my chambers. All right?

(Whereupon, the jury then left the courtroom.)

THE COURT: Go ahead in through there.

A JUROR: Thank you, your Honor.

(Whereupon, they jury then left the courtroom.)

THE COURT: I didn't tell him how to use the phone.

MR. WILLIAMS: I hope you didn't have any papers on your desk.

THE COURT: There is nothing with respect to this case.

MR. WILLIAMS: Your Honor, when you, after you had made the statement to the jury you did, you said, I trust that answers your question, the juror who was sitting to the right of the foreman shook his head in the negative.

THE COURT: That may be, Mr. Williams, and in which instance obviously we will hear from them again.

MR. WILLIAMS: I think, I really think

it highlights the problem that I had attempted to articulate, your Honor, that it just isn't clear from what you told them that there may not be a conviction without a finding of evasion as you defined the term in your charge. And they think that it has got to be made clear.

THE COURT: Well, the trouble is that you tell me that there is no distinction.

MR. WILLIAMS: Well, Judge --

THE COURT: Going one way and on the other hand you tell me that you would be extremely unhappy if there was a conviction on the basis of a finding of an attempt to defeat without an evasion.

MR. WILLIAMS: That's not inconsistent. It's obvious that these people thought, at least up until the time they walked into this courtroom a couple of minutes ago there was a distinction. They are thinking along two different lines and it is absolutely clear that whether or not there is a distinction that I cannot in this case be a conviction without a finding by the jury of evasion.

THE COURT: That may be. In any event what I will do if you wish is to tell the foreman, I will do it in open court when he gets through with his phone call, or if you don't want to do it in open court necessarily to make something significant out of this, I can just simply tell him to go back to the jury room. If there are any further questions of course, obviously ask them. I don't think that needs to be done.

MR. WILLIAMS: I think it is a good idea to do that, but I think that really avoids the problem. I think these people are running down the road of error. They are getting confused and I think you can solve that problem very easily by telling them what the law is, what you have told them in the past, but what they have apparently hadn't fully comprehended which is, you can't convict on the first three counts without a finding of an attempt to evade. That's got to be done. And I think that the problem may have been slightly exaggerated by the fact that when you used the words attempt to evade in your comments

to them just now, you laid very heavy verbal emphasis on the word attempt. Of course the statute, as --

THE COURT: The reason I did that, the question doesn't have the word attempt in it. That's why I wanted to be sure that they weren't going down an improper path, but the fact still remains that I don't remember that I stressed any particular word except obviously I said that what I did but attempt because of the way the question was posed as opposed to what the indictment actually charges. But I don't think that the fact that one of the jurors may have suggested that I haven't answered the question prompts me to do anything more at this particular stage of the proceedings. What I will do is, I will wait on the bench until he is through with his phone call and I will say to him as he passes through that we will obviously entertain any further question if you want me to say that to him.

* * *

THE COURT: Summon the jury, please.

(Whereupon, the jury then came into the courtroom.)

THE COURT: Be seated, ladies and gentlemen. Court Exhibit 12. Mark it, Laurie.

I have from you, ladies and gentlemen, Court Exhibit 12 which reads, are failure to voluntarily disclose one's taxable income and concealment or attempt to conceal synonymous? The answer to that question is, no, they are not synonymous.

All right. You may retire. I have answered the question.

* * *

THE COURT: Counselor, I have, from the jury, a note, exhibit number, Laurie?

THE CLERK: Thirteen.

THE COURT: Court Exhibit 13 and it reads as follows: The jury is deadlocked on counts one, two and three. The jury has reached a verdict with regard to Count four.

I am going to bring them in and I will accept the verdict that they have reached

on Count four and I will read a modified Allen charge with respect to Counts one, two and three.

All right. Summon the jury, please.

MR. HARTMERE: Isn't it better to just give them the Allen charge without taking that verdict on the fourth?

THE COURT: Why?

MR. HARTMERE: So that there is no possible way it could be inferred you had any knowledge of how they were voting.

MR. WILLIAMS: I think Mr. Hartmere is right, your Honor.

THE COURT: I don't have anyway of knowing what they have done on Count four and of course if your wish is that I not at this time take a verdict on Count four, that's all right as far as I'm concerned. Although I am frank to say that I think it's better to put aside a decision that they have made so that they can focus in relation to the Allen charge that is going to be given, focus on what they are deadlocked on.

MR. WILLIAMS: My concern frankly is

about giving them an Allen charge at all.

THE COURT: Of course, but that's not open for discussion, Mr. Williams. I am going to do it and --

MR. WILLIAMS: Is your Honor planning to use the same language which you did in your original charge?

THE COURT: No, I won't.

MR. WILLIAMS: In your original charge you gave them a modified Allen charge already.

THE COURT: No. Well, I told them about the deliberation and that they have, and I'm not going to give them that again. All I am going to do is deal within the modified form that I just will request that they continue their deliberations to see if they can resolve the deadlock. If they can, fine. If they can without compromise their conscious thinking they should of course not compromise. That's part of what is in here.

MR. WILLIAMS: I do object to giving that. If you were going to give it I agree with Mr. Hartmere that you should not take

a partial verdict before you let them respond to whatever you are going to do.

THE COURT: All right. If that's your wish then I will not accept a verdict with respect to the fourth count. I will just simply deal with the overall situation.

Bring the jury in.

(Whereupon, the jury then came into the courtroom.)

THE COURT: You may be seated, ladies and gentlemen.

I have from you a note that I have already read into the record and it will be marked Court Exhibit 13.

I know, ladies and gentlemen, that you have reported to me in the note that as to the first three counts that you are deadlocked and that you have reached an agreement as to the fourth count. I am going to ask you to continue your deliberations at least a little while longer and give to you a few thoughts with respect to your deliberations with the hope that perhaps the result may be a verdict. But of course I want you to understand that these further

instructions should in no way in the first place be a supplement to, or in any way replace any of the evidence that you have before you, nor is this is any way to replace or substitute for any of the instructions that I previously gave to you all of which you must keep in your mind.

This is merely an attempt to give you a few more thoughts with respect to your deliberations. It is not intended to in any way influence your judgment as far as your personal decisions are concerned with respect to this matter, nor is it in any way designed or intended to force you to reach any particular verdict; and in any event it does not in any way constitute any reflection as far as I am concerned on what your verdict should be.

This is, however, an important case. It has been an extensive presentation insofar as both the prosecution and defense are concerned and if you cannot reach a verdict and the case is still open and undecided and it must be disposed of at some time, there is no reason to believe that another

trial would not be as equally onerous or extensive insofar as either side is concerned and that doesn't seem to me to be any reason why a case could be tried any differently or any better necessarily nor more exhaustively insofar as either side is concerned.

A future jury would have to be selected in the same manner and from the same pool from which you have been chosen. Therefore it appears to be no reason why the case would ever be submitted to twelve men and women any more intelligently, more impartial, or more competent to decide it than you nor that the evidence would be in any way clearer or that different evidence could necessarily be produced to more clearly present the issues insofar as either side is concerned.

Of course these matters suggest themselves upon brief reflection to all of us who have been here in court through the trial and the only reason I mention them is because some of them may have escaped your attention which of course, at this point,

has been fully occupied in review of the evidence. But they are matters of course that along with the other and more important ones probably that it is important and desirable that you come to an agreement if you can do so on a guilty in this case but only if you can do so without violence to any one of your individual judgments or conscience. It is unnecessary for me to add, but I do, that in no way do I wish any juror to surrender his or her conscientious convictions with respect to this matter and as stated to you when the case was originally submitted to you none of you individually should surrender your honest conviction as either the weight or the effect of the evidence only because of the opinions of other jurors nor for the mere purpose of returning a verdict.

However, it is your duty as jurors to consult with one another and to deliberate with a view of reaching an agreement, if you can do so without violence to individual judgment of any one of you. Each of you must decide the case yourself but you

should only do so after you have considered the evidence along with your fellow jurors. And in the course of your deliberation you should not hesitate to change your opinion if you are convinced that it is erroneous.

In order to bring twelve minds to a unanimous result, you must examine the question submitted to you with candor and frankness, and with proper deference to and in regard for the opinions of others. That is to say, you, in conferring together, each of you should pay due attention and respect to the others and listen to each other's arguments with a disposition to re-examining your own views.

If much the greater number of you are for a conviction, then the dissenting juror should consider whether a doubt in his or her mind is a reasonable one since it makes no effective impression upon the minds of other equally honest and equally intelligent fellow jurors, who bear the same responsibility, serve under the sanction of the same oath and have heard the same evidence with the same attention and equal

desire to arrive at the truth. On the other hand, if a majority or even a lesser number of you are for acquittal, the other jurors ought seriously ask themselves again whether they do not have reason to doubt the correctness of a judgment which is not concurred in by so many of their fellow jurors, and whether they should not distrust the weight or sufficiency of evidence which fails to convince the minds of several of their fellows to a moral certainty and beyond a reasonable doubt.

You, of course, are not partisans. You are judges, judges of the facts. Your sole purposes to ascertain the truth through the evidence that has been submitted to you. You are the sole and exclusive judges of the credibility of all of the evidence, witnesses and of the weights and effect of all the evidence. In the performance of your duty you are at liberty to disregard all comments of both Court and counsel, including of course the remarks I am making now.

Remember at all times that no juror is

expected to yield a conscientious conviction he or she may have as to the weight or effect of evidence. But remember also that, after full deliberation and consideration of all the evidence, it is your duty to agree upon a verdict, if you can do so without violating your individual judgment and your conscience.

You may conduct your deliberations as you choose, but I am suggesting to you that you now retire and carefully re-examine and reconsider all the evidence bearing upon the questions before you.

I know that many of, much of the time you have spent you have probably been doing exactly that, but I am going to ask that you continue your deliberations with an eye to see whether or not you may find among yourselves an ability to each agreement and that on the one count which you have in fact done so.

But, again, I reiterate to you and repeat, and caution you, do not agree to a verdict, do not change your view as far as the evidence is concerned, the weight and

effect of it unless in order just to simply reach a unanimous verdict and only should you do so if you can do so consistent with your conscientious conviction as to what the true and proper weight of the evidence would be.

In other words, as I have told you repeatedly, each of you must agree to the verdict before it can be unanimous. No one should agree to a verdict just simply to reach a verdict nor should you surrender your honest conviction as to what you think the fair import of the testimony, of the weight of the evidence and the effect of the evidence should be on your essential decision.

And with that I am going to ask you to continue your deliberations and I will await your further advices.

All right, ladies and gentlemen, you may be excused.

(Whereupon, the jury then left the courtroom.)

THE COURT: Mr. Hartmere.

MR. HARTMERE: No comment, your Honor.

THE COURT: You don't have to repeat what you said before but you should of course put on the record anything further you wish to put.

MR. WILLIAMS: I do except to the giving of it at all. In addition to that, your Honor made an inadvertent misstatement. At one point you stated, as I heard it, and I am sure I was correct, it was important that you come to an agreement if you can do so upon a guilty in this case. And I think you meant to say a verdict or a guilty or innocent or something but I'm quite clear in my mind you did inadvertently say that. I am sure it's written down that way.

THE COURT: I don't think I did.

Try to find it, please.

(Whereupon, the portion was then read back by the Court Reporter.)

THE COURT: Bring them back.

(Whereupon, the jury then came back to the courtroom.)

THE COURT: I am going to have the Court Reporter read to you something that I

said earlier that is totally incorrect and improper. I misspoke myself apparently totally inadvertently and totally unintentionally.

Read what I said.

(Whereupon, the portion of the charge was then read by the Court Reporter.)

THE COURT: Obviously the word guilty in that was unintentional. I was reading something that was not of my draftsmanship. Of course all of my material are in Hartford and as I was reading it I was obviously skipping to another phrase and the word guilty in that should in no way have appeared at all. And I certainly want you to understand that my doing so it was totally inadvertent, totally unintentional and was in no way intended to suggest to you anything about what your deliberations should be. It is of course important to have you reach a verdict if you can do so, whatever that verdict may be, consistent with the honest convictions of each one of you. So I would ask you please ignore what I said before if and the portion that the

the Court Reporter to you I am sure you probably won't pay any attention to it anyway. It wouldn't be prejudiced by it. I want you to know it was not in any way intended to influence your judgment and please disregard it and regard only the last remark that I made about what my hope for your further deliberations might be.

All right. With that now you may be excused and I will await your further advices.

Thank you.

(Whereupon, the jury then left the courtroom.)

THE COURT: All right. Anything further?

MR. WILLIAMS: Nothing.

THE COURT: We will stand in recess and we will await the further advices of the jury.

(Short recess.)

THE COURT: The jury has a question. Do you have my copy? Mark it 14.

THE CLERK: Yes.

THE COURT: Mark that, Laurie, please.

Mr. Hartmere, do you have your copy of the indictment or Mr. Williams, one of the two?

MR. WILLIAMS: I don't have mine with me.

THE COURT: What I am concerned about is, I don't have it.

MR. HARTMERE: No, I don't.

THE COURT: Let me tell you what the note is and my problem is I can't put it into continuity. The indictment, the sentence, it's not a sentence but it is part of a sentence and by concealing and attempting to conceal that, with a series of dots at the beginning and a series of dots at the end of the quote indicating obviously they have taken a phrase, appears in the indictment for all of the first three counts, but does not appear in your charge to the jury. Is it necessary to prove this item beyond a reasonable doubt when reaching our verdict?

Now, what I was concerning myself with is the form of the indictment.

MR. WILLIAMS: It is in the indictment,

your Honor. When we check we will confirm this. The indictment alleges that he committed the crime by doing certain things stated conjunctively and that's part of it and so it is my contention as I indicated before, that the Government has taken upon itself the burden of proving that beyond a reasonable doubt as to each of the first three counts. So that the answer to the question is, that they must find that to have been proven in order to convict.

THE COURT: Well, we have the first place, Mr. Williams, the fact that the jury is quite correct that the phrase is not, does not actually appear in the charge and there has been no exception to the charge in that respect.

MR. WILLIAMS: Well, your Honor, I don't believe that it is necessary to take exception to a failure to charge as to an essential element of the crime charged.

THE COURT: Well, the fact of the matter is, I told them what the three elements of the charge are and --

MR. WILLIAMS: You also told them they

they had to find proven and you read the indictment.

THE COURT: I didn't tell them --

MR. WILLIAMS: You sent the indictment into the jury room with them and told them they had to find that proven, if that doesn't state it to them, I don't know what does. I might have had a complaint about not defining the word conceal. It seems to me the word conceal speaks for itself and doesn't require to definition. It is a real element of the offense. It has been tendered to them it is presented to them in the charge and in the documents that were submitted to them in the jury room by your Honor. It is in the indictment and of course it has to be proven.

MR. HARTMERE: It doesn't have to be proven. That's just one way to prove evasion and that's what the indictment charges.

THE COURT: If I said that to them I would unduly I think emphasize one aspect of the case so I am, what I am going to do is, I am going to reread to them and tell

them that my answer to their question is going to be found in the following, which I am going to do and that's going to reread the essential elements of the events as I have previously done and without specifically commenting on this that they --

MR. HARTMERE: I would prefer you answer their question, Judge, because the answer to that question is, no.

MR. WILLIAMS: The answer to that question is, yes, your Honor, and to charge them other than that, the answer to that question is yes, is to say that my client can be convicted of a crime with which he has not been charged.

THE COURT: All right. You want to bring the jury back in and when you get to them, Laurie, get from them the indictment and bring the indictment up here, please.

(Whereupon, the jury then came into the courtroom.)

THE COURT: Please be seated, ladies and gentlemen. My apologies. I didn't have a copy of the indictment. You've got my copy of the indictment. I wanted to

reread the indictment.

What I have now is Court Exhibit 14, the following notes. The sentence quote series of dots indicating an omission, and by concealing and attempting to conceal, a series of dots, appears in the indictment, appears in the indictment for all three counts does not appear in your charge to the jury. It is necessary to prove this item beyond a reasonable doubt when reaching our verdict?

The indictment, ladies and gentlemen, charges a violation of Section 7201 of the Internal Revenue code which is in Title 26 of the United States Code and it alleges in each of the three counts with respect to each of the three is in question, calendar years 1980, 1981 and 1982 that Mr. Schiff had and received a taxable income that he there upon owed a tax, that he was required to make a tax return and to pay such a tax. That knowing all of these facts that he did, on or about April 15, 1981 for the prior year, 1982 for the prior year, 1983 for the prior year did willfully and know-

ingly attempt to evade and defeat the said income tax due and owing by him to the United States for the calendar year, by failing to make such a tax return to the Internal Revenue Service and by failing to pay the tax and by concealing and attempting to conceal from all proper officers the true and correct taxable income, your question focuses on one of the three ways in which the government in the indictment charges the defendant with willfully and knowingly attempting to evade and defeat the tax.

Now, I have read to you before that for the purposes of proving the offense in Counts one, two and three, keeping in mind that each of these is a separate offense, the government has the burden of proving beyond a reasonable doubt the following: First, that a substantial federal income tax was due and owing from the accused for the calendar ywar charged in each count.

Second, actual knowledge of defendant that a substantial federal income tax was due and owing from him to the government,

and thus was his legal obligation, for the calendar year charged in each count.

Third, that defendant willfully attempted, in some manner, to evade or defeat such tax, with the specific intent to defraud the government of such tax.

In the indictment there are three ways in which the government has made the charge that there was a willful attempt in some manner to evade or defeat the tax. What you must be concerned with is whether the Government has proven to your satisfaction beyond a reasonable doubt each of the three elements as I have charged them to you. Therefore, the answer to your question is not really either yes or not in the sense that if the evasion and the only act of evading that you find proven was by the concealing or attempting to conceal, then the answer to the question is, yes. But if you find that some other manner which is the third element of the proof necessary is something, and this again is for you to decide if it happens to be the case, is an act or omission other than concealment, but

which nonetheless constitutes a willful attempt on the part of the defendant to evade or defeat the tax, then the answer to the question is, no.

In other words, the government must prove before the defendant may be convicted in any one of the three years, that the defendant willfully attempted in some manner to evade or defeat the tax with the specific intent to defraud the government of such tax. In the indictment the government has specified three ways in which it claims that the defendant did in fact knowingly and willfully attempt to evade and defeat the said income tax due and owing. It is necessary before the government can be found to have proven and that the defendant violated Section 7201 in regard to any one of the three years, that in some way that the defendant took some action, the purpose of which as I have said to you, I believe in another section of the charge, took some action the purpose of which was to evade or defeat or attempt to evade or defeat or and defeat the tax.

In order to put this in the proper prospective I am going to read further for you a portion of the charge that pertains to the attempt to evade or defeat the tax.

An attempt to defeat or evade a tax involves two things: First, an intent to evade or defeat the tax; and second, some act willfully done in furtherance of such intent.

So, the word attempt requires that the accused had knowledge and understanding that, during a calendar year, he had an income which was taxable and which he was required by law to report; but that he nevertheless attempted to evade or defeat the tax thereon by willfully failing to report all the income which he knew he had during such calendar year and which he knew it was his duty under the law to state in his return for such year; or by some other act or course of action, the purpose of which was to evade or defeat the payment of the tax.

The defendant is not merely charged with failure to file tax returns; he is

charged with evasion, and thus he must be proven to have taken some action for the purpose of evading or defeating payment of a tax. This means more than that he merely failed to file a tax return which the law obliged him to file. While failure to file may be an act of evasion, if evasion was his purpose, the government must prove an act or acts the purpose and intent of which was specifically to evade or defeat the payment of a tax which the law requires the defendant to pay.

Various schemes, subterfuges and devices may constitute an attempt to evade or defeat a tax. The statute makes it a crime willfully to attempt, in any way or manner, to evade or defeat any income tax imposed by law. It is for you to determine whether the defendant did have the attempt to evade or defeat a tax which he owed and whether he acted willfully so as to accomplish, or attempt to accomplish,the evasion or defeat of such a tax.

I think that I have therefore answered your question and with that I will ask you

to retire and I will return to you through the Clerk the indictment.

(Whereupon, the jury then left the courtroom.)

THE COURT: Mr. Hartmere.

MR. HARTMERE: That's fine, your Honor. I think you answered the question.

THE COURT: Mr. Williams.

MR. WILLIAMS: Your Honor, you have so charged the jury as to permit them to convict Mr. Schiff without being unanimous, because you have not instructed them that the same manner which they find must be the same manner for each juror and the way you have charged them permits one of them to find that it was because he concealed and another one to find it was he used blue pens, another one to find because of something else, whatever. So that any verdict returned on those three counts on the fact of this charge I think couldn't be found to have been necessarily unanimous verdict.

Moreover, your charge to the jury permits Mr. Schiff to be convicted in some manner other than that which he was

charged. The Government had the option of submitting to the grand jury an indictment in the form it wished. If it didn't like the form he could amend it. The Government has seen fit to accuse him of doing a specific set of things. The statute of course may be violated in a variety of ways, but he is not charged with violating the statute in every way conceivable. He is charged with violating the statute in a specific way as of course he must be or else he would not know the nature and cause of the accusation against him.

The Government, having done that, the Government is now bound by its pleading. The indictment cannot be amended in the way that the Court has suggested by changing the conjunctive to the disjunctive and adding a catchall at the end to include things not even accused and that's what you have allowed here. So that even if we had the never to be known verdict of a jury that was unanimous they might be unanimous in finding against him facts not charged and convicting him on the basis of those,

they have to do more than reach a legal conclusion. They must find facts, they must find the facts beyond a reasonable doubt as alleged in the indictment in order to have a valid conviction.

And so I ask you to call them back and tell them, first of all, that the answer to that question was just simply, yes, and if you won't do that, then I think that we would have a situation of error, but in any event to make it only one error rather than two to tell them that whatever their factual basis is, they must be anonymity as to that factual basis.

THE COURT: What you are suggesting, Mr. Williams is that unless a jury finds that the state of mind of the defendant is absolutely and uniformly so found by the jury that they cannot be regarded as having come to a unanimous verdict.

MR. WILLIAMS: That's correct.

THE COURT: I am frank to say I don't think that's the law and in any event I think that what I have charged them was a correct and proper answer to their ques-

tion. I will not charge further.

MR. HARTMERE: If I might just add the latter part of your charge wa, what was given the first time around to which there was no exception so how there can be a difference in the meaning now is beyond me. I don't think that there is. It means the same thing now as it did then.

MR. WILLIAMS: The fact of the matter is, your Honor, that the jury has focused on a problem which I didn't perceive. They have asked you to clarify what appeared to them to be confusion. You have done so in a way that I respectfully submit is illegal.

Now, this is a recharge. It is a charge in a manner not given before and I certainly think it is appropriate for you to charge correctly when they ask you a question I respectfully submit that you haven't regardless of what the charge may have been previously.

THE COURT: All right. I will not recharge further at this time. We will await the further advices of the jury and

we will stand in recess.

I will amend what I said further. I think I will await now for maybe another, well, --

MR. HARTMERE: Forty-five minutes, Judge?

MR. WILLIAMS: Ten minutes.

THE COURT: I think I will wait, I will divide it. I will await to probably about five or ten minutes after four at which time I will think at that time I will bring them in and ask them the question if I could ask you to please be available at 4:00 o'clock or within five minutes afterwards if you be here then somewhere around five after four I will put them the question at that juncture whether continue deliberation today is appropriate or whether we should read that back on Monday. All right.

(A short recess.)

THE COURT: I have an additional note, counsel, from the jury. Exhibit 15 which reads, we have reached a verdict with regard to all four counts.

No. 86-1026

In the Supreme Court of the United States

OCTOBER TERM, 1986

IRWIN A. SCHIFF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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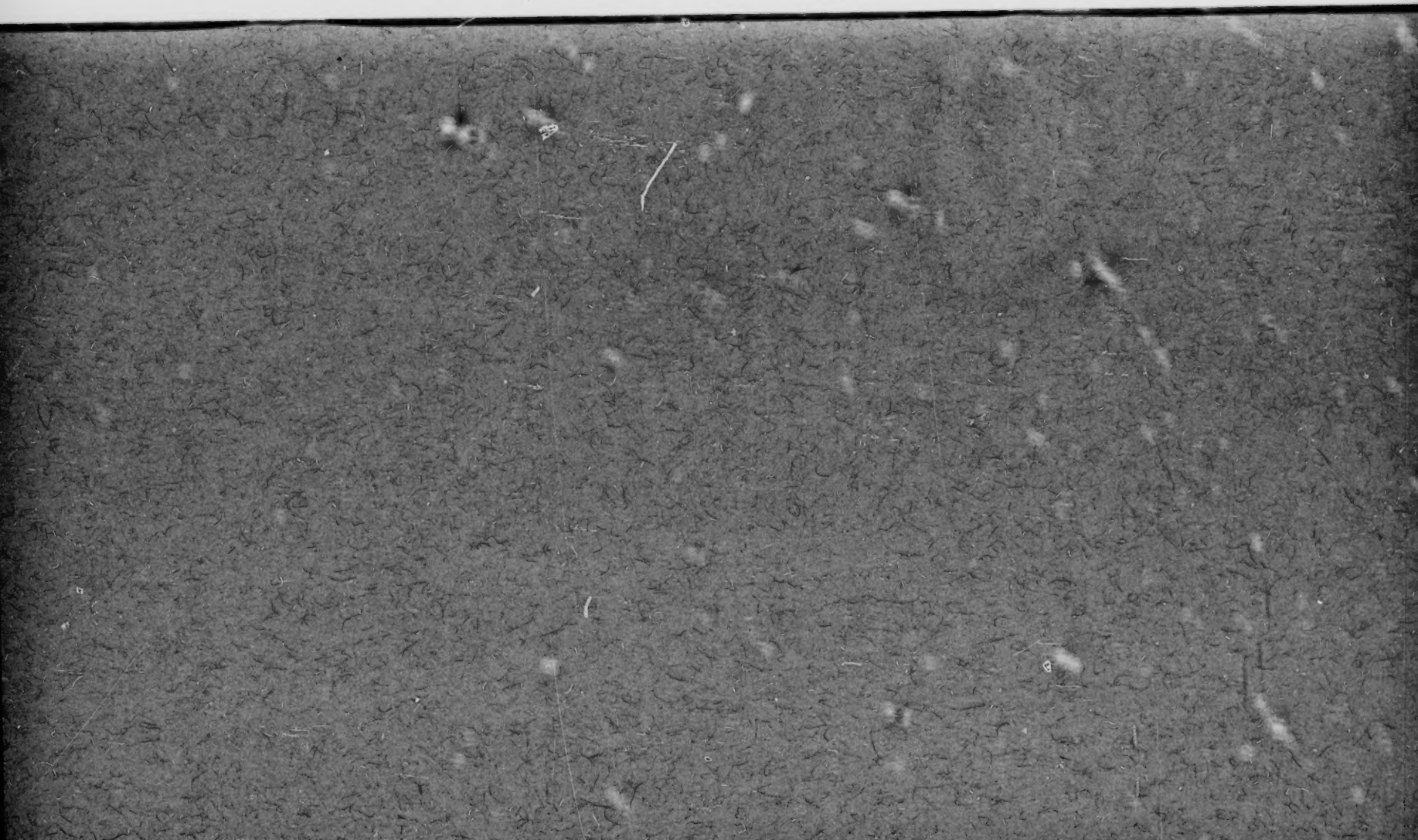

QUESTIONS PRESENTED

1. Whether the trial court's instructions incorrectly indicated to the jury that they could convict a defendant of tax evasion even if he held a good faith belief that he did not have to pay taxes.

2. Whether the trial court's instructions incorrectly indicated to the jury that they could convict a defendant of tax evasion simply for failing to file a return and pay a tax.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1026

IRWIN A. SCHIFF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1b-27b) is reported at 801 F.2d 108.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 1986. A petition for rehearing was denied on October 22, 1986 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on December 18, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following a jury trial in the United States District Court for the District of Connecticut, petitioner was convicted on three counts of attempted evasion of personal income taxes, in violation of 26 U.S.C. 7201, and on one count of failure to file a corporate income tax return, in

violation of 26 U.S.C. 7203. He was sentenced to six years' imprisonment, followed by three years' probation, and was ordered to pay fines totalling $30,000. The court of appeals affirmed (Pet. App. 1b-27b).

a. Petitioner is an author, lecturer, and self-proclaimed expert on taxes and the United States Constitution. At trial, the government established that petitioner failed to file federal income tax returns for the calendar years 1980, 1981, and 1982. The proof also showed that he did not pay any income taxes for those years and that his corporation, Irwin A. Schiff, Inc., failed to file a tax return for its fiscal year ending 1981. Petitioner did not dispute that he did not file federal income tax returns or pay income taxes for the prosecution years. Pet. App. 3b-4b.

The government also presented evidence to establish that petitioner engaged in transactions with financial institutions in Switzerland and the Cayman Islands. The precise nature of the transactions could not be determined because of the bank secrecy laws of those countries and because petitioner refused to disclose any information concerning his sources of income (Pet. App. 5b; Tr. 1899-1901, 1905-1906, 2034-2036). Furthermore, petitioner's transactions with the financial institution in the Cayman Islands were conducted through the use of a numbered account, which prevented the Internal Revenue Service from obtaining the records of that account (Tr. 2056-2057).

Petitioner and his employees used pens with non-reproducible ink in an attempt to prevent the Internal Revenue Service from photocopying petitioner's financial records (Pet. App. 5b; Tr. 718-728, 1108-1110). The use of non-reproducible ink hampered the Internal Revenue Service in its efforts to determine petitioner's taxable income (Tr. 2032).

Petitioner advised those who attended his seminars that they could not be convicted of income tax evasion as long as they did not file any income tax returns (Tr. 472-473). He also advised others to thwart the Internal Revenue Service in its tax collection efforts by lying, cancelling appointments, and using incorrect social security numbers (Tr. 476; GXs 33-1, 33-2). In addition, petitioner filed a "Declaration of Trust" and quitclaim deed pursuant to which he transferred to his children title to real property. Actions of that nature tend to cloud title to the property and to impede the Internal Revenue Service in its collection of taxes. Petitioner filed a similar declaration of trust with the Simon and Schuster Publishing Company for the royalties from his book, *How Anyone Can Stop Paying Income Taxes*. Tr. 855-858, 1241-1251, 1686-1703; GXs 35-1, 36-4.

b. Petitioner did not testify at trial. His defense was that he did not "willfully" evade taxes, because his failure to pay was based on a good faith misunderstanding of the tax law. Petitioner's defense was supported by testimony that he relied on the advice of counsel in failing to pay his taxes. Pet. App. 6b-7b.

The district court instructed the jury that the government had to prove that petitioner knowingly and willfully violated the law and that petitioner's conduct would not have been willful if he had acted in accordance with a good faith misunderstanding of the law (Pet. App. 24e-30e). Specifically, the court instructed that, if petitioner believed in good faith that his income was not taxable or if he had a good faith misunderstanding of the law, he did not have the criminal intent necessary for conviction (*id.* at 28e-29e). The court added, however, that a good faith misunderstanding of the law is different from a mere disagreement with the law (*id.* at 29e). In this connection, the court instructed the jury that "[i]n considering the Defendant's claim that in good faith he did not believe the law required him to file returns

or to pay taxes on income, the question is, whether or not he truly held such a belief; and whether there was a basis on which he could have held such a belief" (*id.* at 30e). Petitioner did not object to this portion of the instruction at any time during the trial (*id.* at 9b).[1]

c. The court of appeals affirmed petitioner's convictions (Pet. App. 1b-27b). Petitioner argued on appeal that the portion of the district court's instruction referring to the basis for petitioner's belief constituted "plain error" because it improperly directed the jury to apply an objective test to determine the willfulness of his conduct, rather than a subjective test requiring the jurors to ascertain his actual beliefs and intent. The court of appeals rejected that characterization of the instruction. It held that the instruction did not impose an objective test, but rather directed the jury to determine whether petitioner actually held a good faith belief in the legality of his actions. *Id.* at 9b-12b.[2]

ARGUMENT

1. There is no merit to petitioner's contention (Pet. 12-15) that the trial court's instructions were inconsistent with the requirement that the government prove that petitioner

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[1]Petitioner suggests (Pet. 11) that he did timely object to the portion of the charge at issue here. The objection cited by petitioner, however, is addressed to a different point—whether "willful blindness" by the defendant could defeat the good faith defense (see Pet. App. 54e-56e). The court of appeals found (*id.* at 9b) that petitioner failed to object to the relevant portion of the charge, and it treated the issue before it as whether the instruction constituted plain error.

[2]The court also stated that, even if the instruction had imposed an "objective reasonableness" test, it would not have been erroneous. The court stated that the evidence clearly established that petitioner was aware that his interpretation of the law had been rejected by two federal courts and he had been apprised in previous trials that his interpretation was incorrect; thus, he no longer could have had a good faith belief that his views as to the tax system were in fact the law. Pet. App. 12b-14b. The court concluded that "the good faith defense encompasses misunderstanding of the law, not disagreement with the law" (*id.* at 13b).

had a subjective intent to violate the law. The plain import of the court's instruction was that the jury was required to consider petitioner's actual beliefs, and the court did not instruct the jury that petitioner's beliefs had to be objectively reasonable in order to negate willfulness. The court's instruction to the jury to consider the "basis" asserted for petitioner's beliefs was calculated to direct the jury's inquiry to whether petitioner genuinely believed in good faith that he did not have to pay taxes or, rather, whether he was asserting such a belief as a smokescreen to camouflage willful tax evasion.[3] As the court of appeals correctly noted (Pet. App. 10b), "[i]f the defendant's mere claim of good faith is not to be the end of the case, a trier of fact must evaluate the 'basis' for that claim in order to determine whether the claim is genuine."

The courts of appeals have unanimously upheld similar instructions permitting the jury to consider the basis of a defendant's asserted belief in considering whether the belief is held in good faith. Such an instruction, the courts have held, does not deviate from the subjective intent standard. See, *e.g.*, *United States* v. *Payne*, 800 F.2d 227, 229 (10th Cir. 1986); *United States* v. *McCarty*, 665 F.2d 596, 597 & n.2 (5th Cir.), cert. denied, 456 U.S. 991 (1982); *Cooley* v. *United States*, 501 F.2d 1249, 1253 & n.4 (9th Cir. 1974), cert. denied, 419 U.S. 1123 (1975). In particular, petitioner's assertion that the decision below conflicts with First Circuit precedent is without merit. In *United States* v. *Turano*, 802 F.2d 10 (1986), the First Circuit rejected a challenge to instructions that directed the jury to consider "on what [the

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[3]This focus was made quite clear in the court's instructions (Pet. App. 29e): "The grounds on which Defendant bases his claims of good faith in a belief that his conduct was lawful may be considered in deciding whether he in fact acted in good faith, or whether he intended and willfully attempted to evade or defeat the tax."

defendant's position] was based" (*id.* at 11). The instructions in *Turano* were almost identical to those given in this case. The *Turano* court explained that the instruction as a whole "properly inform[ed] the jury how to apply a difficult subjective test" (*ibid.*). In sum, there is no basis for petitioner's assertion that his case would have been decided differently if it had arisen in another circuit, and there is no conflict in the circuits that requires resolution by this Court.[4] The trial court did not err at all in instructing the jury on this point, much less commit plain error.

2. Petitioner contends (Pet. 15-18) that the court's supplemental instructions in response to a question submitted after the jury had begun its deliberations erroneously permitted the jury to convict him of tax evasion solely on the basis of his failure to file a return and to pay a tax.

a. The factual background of this issue is as follows. The first three counts of the indictment charged that petitioner received taxable income in amounts requiring him to file income tax returns and to pay income tax, but that petitioner "did willfully and knowingly attempt to evade and defeat the said income tax * * * by failing to make such income tax return to the said Internal Revenue Service, and by failing to pay to the Internal Revenue Service said income tax, and by concealing and attempting to conceal from all proper officers of the United States of America his true and correct taxable income" (Pet. App. 1c-4c). During the course of its deliberations, the jury submitted a question

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[4]The cases cited by petitioner as being in conflict with the decision below (see Pet. 12-14) are all inapposite because in each case where the instructions were held invalid the jury had been instructed that it could convict the defendant even if he held a good faith belief that his conduct was lawful, as long as that belief was objectively unreasonable. As noted in the text, each of the circuits represented in those cases—the First, Fifth, and Tenth—has upheld instructions similar to those given in this case.

to the court with respect to whether it had to find that the government proved the "concealing and attempting to conceal" element beyond a reasonable doubt. The trial court responded by first re-instructing the jury that the government must prove beyond a reasonable doubt the following: the existence of a substantial tax deficiency for each of the prosecution years; knowledge on the part of petitioner that the tax was due and owing; and a willful attempt, in some manner, to evade or defeat such tax (*id.* at 132e-133e). The court then stated (*id.* at 133e-136e):

> In the indictment there are three ways in which the government has made the charge that there was a willful attempt in some manner to evade or defeat the tax. What you must be concerned with is whether the government has proven to your satisfaction beyond a reasonable doubt each of the three elements as I have charged them to you. Therefore, the answer to your question is not really either yes or no in the sense that if the evasion and the only act of evading that you find proven was by the concealing or attempting to conceal, then the answer to the question is, yes. But if you find that some other manner which is the third element of the proof necessary is something, and this again is for you to decide if it happens to be the case, is an act or omission other than concealment, but which nonetheless constitutes a willful attempt on the part of the defendant to evade or defeat the tax, then the answer to the question is, no.
>
> In other words, the government must prove before the defendant may be convicted in any one of the three years, that the defendant willfully attempted in some manner to evade or defeat the tax with the specific intent to defraud the government of such tax.
>
> * * * * *

> The defendant is not merely charged with failure to file tax returns; he is charged with evasion, and thus he must be proven to have taken some action for the purpose of evading or defeating payment of a tax. This means more than that he merely failed to file a tax return which the law obliged him to file. While failure to file may be an action of evasion, if evasion was his purpose, the government must prove an act or acts the purpose and intent of which was specifically to evade or defeat the payment of a tax which the law requires the defendant to pay.

b. At the outset, we note that this contention—that the challenged instruction suggested to the jury that evidence of petitioner's failure to file a return or his failure to pay income taxes would constitute a sufficient basis to convict for attempted tax evasion—is raised for the first time in this Court. Petitioner did not make this objection in the trial court, nor did he raise it in the court of appeals. Accordingly, the claim should not be considered. See, *e.g.*, *Berkemer* v. *McCarty*, 468 U.S. 420, 443 (1984); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).[5]

In any event, petitioner's contention is without merit. Because petitioner did not timely object to the charge on this ground, thereby giving the trial court the opportunity to rectify the alleged error, he has forfeited any claim of error unless it is "so 'plain' the trial judge and prosecutor

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[5]Petitioner did argue on appeal the distinct claim that the court's response to the question permitted the jury to base its conviction on conduct not charged in the indictment and to reach a non-unanimous verdict on the basis of uncharged acts (see Pet. App. 17b-25b). The court of appeals correctly rejected these arguments, holding that the instruction directed the jury to consider only the methods of evasion alleged in the indictment and that the jury was adequately charged on the necessity of a unanimous verdict (*id.* at 20b-25b).

were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." *United States* v. *Frady*, 456 U.S. 152, 162-163 (1982); see Rules 30 and 52(b), Fed. R. Crim. P. Any error in the court's instruction did not rise to this level. While the instruction was not a model of clarity, it sufficiently apprised the jury of the government's burden of proof, and it did not constitute plain error.

It is well established that, to obtain a felony conviction under Section 7201 for attempting to evade and defeat income tax, the government cannot rely solely on evidence proving the misdemeanors of failure to file a tax return and failure to pay income tax, but must also establish an affirmative act constituting evasion or attempted evasion. *Sansone* v. *United States*, 380 U.S. 343 (1965); *Spies* v. *United States*, 317 U.S. 492 (1943). The requisite affirmative attempt "may be inferred from such conduct as * * * concealment of assets or covering up sources of income, handling one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal." *Spies* v. *United States*, 317 U.S. at 499. The court's instructions, taken as a whole (see *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973)), adequately informed the jury of these requirements for conviction.

The court instructed the jury at several points in the charge that proof of failure to file an income tax return was not a sufficient basis to convict petitioner on charges of tax evasion (Pet. App. 25e, 26e, 64e, 65e). The court also charged the jury that the government was required to prove that petitioner took some affirmative action to evade or defeat the payment of income taxes (*id.* at 25e, 27e). And the court definitively told the jury that failure voluntarily to disclose taxable income was not synonymous with an attempt to conceal income (*id.* at 113e). These basic points were specifically reiterated by the court in the challenged

supplemental instructions in response to the jury's inquiry. The court stated that the defendant "must be proven to have taken some action for the purpose of evading or defeating payment of a tax. This means more than that he merely failed to file a tax return which the law obliged him to file" (*id.* at 136e). In addition, the jurors were given a copy of the indictment, which correctly set forth the statutory requirements for conviction, to use in their deliberations, and they were instructed that all elements of the crime had to be proven beyond a reasonable doubt. Thus, the charge, viewed as a whole, was correct, and the supplemental instruction plainly did not constitute a "miscarriage of justice" (*United States* v. *Frady*, 456 U.S. at 163 n.14) that would warrant reversal.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6]Petitioner does not dispute that there was ample evidence that he had affirmatively concealed, or attempted to conceal, his taxable income (see Pet. App. 24b). See also pages 2-3, *supra*.